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THE OFFENCE OF WILFUL NEGLECT TO MAINTAIN A WIFE

Two recent cases[1] have underlined the uncertainty surrounding the matrimonial offence of wilful neglect to maintain. In this article it is proposed to recall briefly the statutory history of this offence, then to discuss these cases in the light of such meagre authorities as previously existed, and finally to venture some criticisms of the present state of the law.

The Statutory History of the Offence

By section 4 of the Summary Jurisdiction (Married Women) Act, 1895, the husband's wilful neglect to provide reasonable maintenance for the wife or her infant children whom he was legally liable to maintain was included as one of five specific grounds upon which the wife might seek a justices' order for the maintenance of herself and her children.[2] So far as concerned wilful neglect, this was a

[1] *Jones* v. *Jones* [1958] 3 All E.R. 410; *Lilley* v. *Lilley* [1958] 3 All E.R. 528 (Div.Ct.); [1959] 3 W.L.R. 306 (C.A.).

[2] The other grounds were a summary conviction for an aggravated assault upon the wife, a conviction upon indictment for an assault upon her where the sentence exceeded a £5 fine or two months' imprisonment, persistent cruelty towards her, and desertion. Further grounds were added by the Licensing Act, 1902 (habitual drunkenness—drug-addiction being added in 1925), the Summary Jurisdiction Act, 1925 (insistence on sexual intercourse when suffering from venereal disease, compelling submission to prostitution, and persistent cruelty to wife's children), and the Matrimonial Causes Act, 1937 (adultery). The Matrimonial Proceedings (Magistrates' Courts) Bill, now before Parliament, which consolidates and amends the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, adds a new ground, that of a conviction for a sexual offence against a child of either spouse, and makes all the grounds (except, of course, compelling submission to prostitution) equally available to the wife, although wilful neglect by the wife may only be a cause for complaint where the husband's earning capacity is impaired and the wife might reasonably be expected to provide, or contribute towards, reasonable maintenance for him and the children having regard to the available resources of either spouse and all the circumstances. The Bill embodies most, but not all, of the recommendations of the Royal Commission on Marriage and Divorce (see Cmnd. 9678, paras. 1018–1065).

modification of the Married Women (Maintenance in Case of Desertion) Act, 1886, which had for the first time enabled a married woman to apply for a justices' order where her husband was wilfully neglecting or refusing to maintain her, or her and her family, but only if this wilful neglect was combined with his desertion. Before 1886, the neglected wife could either avail herself of her right at common law to pledge her husband's credit for necessaries—a remedy as circumscribed in law as ineffectual in practice—or she might link a claim for financial provision to a petition in the High Court for a decree of restitution of conjugal rights, judicial separation, nullity or dissolution of the marriage. If she adopted the latter course, she would have the burden of establishing the existence of one of the grounds appropriate to the particular decree sought: to prove merely that the husband had wilfully neglected to maintain her would not in itself be sufficient, although it might be an important factor in establishing such grounds as desertion or cruelty. Apart from these remedies accorded to the wife herself, the Poor Law Amendment Act, 1868, empowered the Poor Law authorities to obtain a justices' order on her behalf against the husband where she was in receipt of poor relief through his failure to maintain her.[2a]

The new statutory relief contained in the Act of 1895 was there qualified by the condition that the neglect to maintain must have caused the wife to leave her husband and live apart from him.[2b] This qualification was removed in 1925: since the Summary Jurisdiction (Separation and Maintenance) Act, 1925, a justices' order may be obtained even where the wife (as one judge put it) "despite her husband's conduct, for reasons of forbearance or straitened circumstances, remained under the same roof."[3] But, although there is now jurisdiction to make an order, it cannot be enforced so long as the wife continues to reside with the husband, and if the residence continues for three months after the order is made, the order ceases to have effect.[4] On the other hand, continuing cohabitation in the full sense is, and always has been, a complete bar to any proceedings under the Act, and its resumption causes an existing order to lapse.[5]

[2a] Poor Law Amendment Act, 1868, s. 33. For this and other relevant provisions of the Poor Law, see Brown, "National Assistance and the Liability to Maintain One's Family" (1955) 18 M.L.R. 112–116.

[2b] This "constructive desertion" replaced the 1886 requirement of desertion *simpliciter* by the husband. Desertion, of course, had now become a separate ground for applying for an order, so that, whether he left her, or she was caused to leave him, in either case she could seek an order.

[3] See s. 1 (1).

[4] s. 1 (4).

[5] For the distinction between residence and cohabitation in this context, see *Evans* v. *Evans* [1947] 2 All E.R. 656 and *Wheatley* v. *Wheatley* [1949] 2 All E.R. 428, and compare divergent view of Denning L.J. in *Hopes* v. *Hopes* [1948] 2 All E.R. 920. The new Bill (by s. 7 (1)) would change the present law by allowing an order to be made, but not enforced, during cohabitation, such order to cease to have effect if the cohabitation continued for three months. Thus,

The Act of 1895 also provides that no order shall be made on a wife's application where it is proved that she has been guilty of adultery, unless the husband has condoned or connived at, or by his wilful neglect or misconduct conduced to, the adultery[6]; moreover, an existing order must be discharged upon the husband's request where the wife subsequently commits adultery.[7]

In 1949 wilful neglect to maintain was made an independent ground for proceedings in the High Court.[8] This jurisdiction of the High Court, which is now contained in section 23 of the Matrimonial Causes Act, 1950, is of course wider than that of the magistrates in regard both to the amount and to the form of the financial provision which may be made for the wife.[9] But the meaning to be attached to the words "wilful neglect to provide reasonable maintenance" in section 23 is the same as that borne by the same words in the Act of 1895.[10]

The only other statutory mention of wilful neglect to maintain a spouse is in section 51 of the National Assistance Act, 1948, which in substance re-enacts an old provision in the Vagrancy Act, 1824.[11] Section 51 makes it a criminal offence where a person wilfully refuses or neglects to maintain himself or herself, or his or her spouse or children.[12] Section 42 of the Act of 1948, which imposes an express duty on each spouse to maintain the other spouse and the children, does not speak of wilful neglect,[13] nor does section 43, which is the modern counterpart to the provision in the Act of 1868 mentioned above and empowers the National Assistance Board itself to apply for an order against the spouse defaulting in his duty under section 42.

Such are the statutory provisions which embody the offence of wilful neglect to maintain.[14] As so often with matrimonial

mere residence would no longer make the order unenforceable (*cf. Caras* v. *Caras* [1956] 1 All E.R. 624n. where a High Court order under M. C. A., 1950, s. 23 was enforced despite the parties being resident together). All but one of the Royal Commission recommended that an order made on the ground of wilful neglect should be enforceable notwithstanding cohabitation (Cmnd. 9678, para. 1049).

6 s. 6.

7 s. 7. But if the adultery has been conduced to by his failure to keep up payments under the order, the court may refuse to discharge it (S. J. A., 1925, s. 2 (1) (*a*)). The new Bill (by s. 8 (2) (*b*)) would extend the court's discretion to cases where he had condoned or connived at the adultery (thereby nullifying the effect of *Marczuk* v. *Marczuk* [1956] 1 All E.R. 657).

8 Law Reform (Miscellaneous Provisions) Act, 1949, s. 5.

9 Thus, periodical payments are not limited in amount and may be secured for the spouses' joint lives (see *Pigott* v. *Pigott* [1957] 3 All E.R. 432).

10 *Tulip* v. *Tulip* [1951] P. 378, at 385.

11 Vagrancy Act, 1824, s. 3.

12 Children include, in the case of a man, children of whom he is adjudged putative father and, in the case of a woman, her illegitimate children: s. 42 (2). The term is limited by s. 64 (1) to those under the age of 16 years.

13 s. 42 (1) states: "For the purposes of this Act—(*a*) a man shall be liable to maintain his wife and his children, and (*b*) a woman shall be liable to maintain her husband and her children."

14 But see Children and Young Persons Act, 1933, s. 1, for offence of wilful neglect to provide adequate food, clothing, medical aid or lodging for one's child.

offences, it has been left to the courts to work out exactly what meaning is to be given to these words. The result, it must be confessed, is not altogether happy. Such cases as there are may be found conveniently gathered together in 12 Halsbury's *Laws* (3rd ed.) 482, para. 1077, where the learned author summarises their effect as follows:

> "The phrase 'wilful neglect to provide reasonable maintenance' must be considered as a whole; the phrase imports not merely a failure to maintain but also some element of matrimonial misconduct and wrongful default on the part of the husband in the failure to maintain. If a wife leaves and disclaims her proper obligations to her husband without grave and weighty matter of complaint against him to justify her, she cannot obtain maintenance on the grounds either of desertion or wilful neglect to maintain her, though it seems that she is not necessarily disentitled to an order on the ground of failure to maintain her infant child."

Of the cases cited in support of these propositions [15] only one contains anything approaching a definition. This is *Weatherley* v. *Weatherley* where Lord Merrivale P. said [16]:

> "What seems requisite, before a husband can be found guilty of a wilful breach of his duty to maintain his wife, is that there must be a refusal to maintain, which has no explanation reasonable in common sense and good faith. I am not going to try to define the state of things in which it might arise, but I will say that where, upon proved facts, the husband against whom the charge is maintained is shown to have done his duty to the best of his ability, and never wilfully to have failed in his duty to discharge his marital obligations, taking them generally as the relations of husband and wife, there is very great difficulty in conceiving a case where a woman can disclaim her proper obligations to her husband, and, having failed to be maintained separately by reason of her disclaimer, make herself a complainant in law on the ground of her own wrong."

In many of the cases [17] the wife's complaint has been dismissed because the court has found her to be in a state of desertion herself and treated this fact as depriving her of her statutory right to be maintained, just as it has always disentitled her to maintenance at common law—at least so long as the desertion continues. Adultery

[15] The cases cited include: *Morton* v. *Morton* [1942] 1 All E.R. 273 and [1954] 2 All E.R. 248; *Jones* v. *Jones* (1929) 94 J.P. 30; *Whittaker* v. *Whittaker* [1939] 3 All E.R. 833; *Starkie* v. *Starkie* (*No. 2*) [1953] 2 All E.R. 1519; *Papadopoulos* v. *Papadopoulos* [1930] P. 55; *Stringer* v. *Stringer* [1952] P. 171; *Snow* v. *Snow* (1932) 96 J.P. 477; *Weatherley* v. *Weatherley* (1929) 94 J.P. 38; *Burrow* v. *Burrow* (1930) 143 L.T. 679; *Clark* v. *Clark* (1931) 145 L.T. 487; *Richardson* v. *Richardson* (1942) 167 L.T. 260; *Winnan* v. *Winnan* [1949] P. 174; *Baker* v. *Baker* (1949) 66 T.L.R. (Pt. 1) 81; *Marjoram* v. *Marjoram* [1955] 2 All E.R. 1.

[16] (1929) 94 J.P. 38, at 39.

[17] *e.g.*, *Burrow* v. *Burrow*, *Richardson* v. *Richardson*.

on the wife's part has the like effect: we have already seen that the Act of 1895 expressly so provides, but even without that provision the courts would doubtless have followed the common law which has always regarded the adulterous wife as having forfeited her right to maintenance.[18] Even a reasonable but mistaken belief in the wife's adultery has been held to exonerate the husband from his liability under the Act of 1895 [19]; but once the court has found that the wife has not committed adultery the husband's liability is revived from the date of such finding.[20]

Where the wife's case has failed in this way because of her own misconduct or apparent misconduct, the court has not felt called upon to inquire further into the wilfulness or otherwise of the husband's conduct. But in cases where the wife's conduct has been blameless it becomes necessary to investigate whether the husband's own behaviour contains that element of misconduct which the word " wilful " is said to import into the offence.

Two Recent Cases

What is meant by wilful in this context is a puzzling question which the courts have never squarely answered. Nor unfortunately is an answer to be found in the two latest cases, although both provided an admirable opportunity to clarify the law on this important point, the absence of wilfulness on the husband's part being treated in the Divisional Court, at least, as the critical factor in both decisions. The consideration of the earlier cases is best deferred until after these latest cases have been discussed.

The first case is *Jones* v. *Jones*.[21] The facts were that the husband was permanently confined to hospital because of a chronic disability for which he received a pension from the Ministry of Pensions. Since October 1953 the Ministry had regularly deducted from this pension and paid to his wife a weekly sum in accordance with an order in her favour obtained against the husband by the National Assistance Board under section 43 of the Act of 1948. Notwithstanding the punctual payments under this order, the wife now sought a maintenance order under the Summary Jurisdiction Acts on the ground of his wilful neglect to maintain her. The justices found the existing payments insufficient for her needs and made an order that he should pay her a further £2 a week. The husband appealed.

[18] *R.* v. *Flintan* (1830) 1 B. & Ad. 227, 230.

[19] *Chilton* v. *Chilton* [1952] P. 196; *Hartley* v. *Hartley* [1955] 1 All E.R. 625. The same defence was applied in a prosecution under Vagrancy Act, 1824, s. 3, in *Morris* v. *Edmonds* (1897) 77 L.T. 56; but see *Roberts* v. *Regnart* (1921) 86 J.P. 77 and *Biggs* v. *Burridge* (1924) 89 J.P. 75 (criticised in Edwards, *Mens Rea in Statutory Offences*, p. 33).

[20] *Allen* v. *Allen* [1951] 1 All E.R. 724 (distinguishing *Glenister* v. *Glenister* [1945] 1 All E.R. 513, where the belief was accepted as justifying the husband in leaving his wife); *cf. West* v. *West* [1954] 2 All E.R. 505.

[21] [1958] 3 All E.R. 410.

The Divisional Court (Lord Merriman P. and Hewson J.), differing from the justices, decided that the wife had not proved her case of wilful neglect. Lord Merriman, after citing the observation of Denning L.J. in *National Assistance Board* v. *Parkes* [22] that "so long as the husband is ignorant of the new situation he is under no such duty (to maintain her), and is not guilty of wilful neglect to maintain her," continued:

> "In the absence of proof of the important facts that her situation had changed for the worse, that the money which was being provided for her under the order of October 6, 1953, was not sufficient to meet her needs, and that this was brought home to the knowledge of the husband, in my opinion, on the authority of the passage that I have just read, the wife fails. Likewise on the line of authorities *Starkie* v. *Starkie* (*No. 2*), *Whittaker* v. *Whittaker*, *Diggins* v. *Diggins*, *Jones* v. *Jones* [23] and others, which have laid down that the element of misconduct is implicit in the words 'wilful neglect to provide reasonable maintenance,' I think that the wife has failed to prove her case, from whichever point of view one looks at it."

Although the President here found in favour of the husband, he recognised that "as a matter of realism" this would not be the end of the story. Presumably he envisaged that the wife would try again before the justices, where she could hardly fail to succeed at the second attempt, as the husband would then have notice of her needs, if only through the present proceedings. Nor, *semble*, would his regular payments under the existing order of October 1953 prevent him, in these circumstances, from being guilty of wilful neglect to maintain her. Some support for this last proposition may be derived from *Birmingham Union* v. *Timmins* [24] where the converse situation arose, the Poor Law Union obtaining an order against the husband under the Act of 1868 notwithstanding his regular payments under a justices' order for maintenance under the Summary Jurisdiction Acts.

The case of *Jones* seems to decide that the element of misconduct implicit in the offence of wilful neglect is not present unless the husband, knowing that the wife's circumstances have worsened and that she is in need, neglects to meet her needs within the measure of his ability. If this be the correct interpretation of the decision, the second of the two sentences quoted from the President's judgment will be seen to give, not an alternative reason, but rather the same reason restated in more general terms. It is assumed of course, that the wife has not disentitled herself to maintenance through her own misconduct: misconduct on her part, such as adultery or desertion, introduces different considerations.

[22] [1955] 2 Q.B. 506, at 517.
[23] *Diggins* v. *Diggins* [1927] P. 88; for the other cases, see note 15 above.
[24] [1918] 2 K.B. 189.

These considerations were present in *Lilley* v. *Lilley*,[25] the second of our two recent cases, where the history of the marriage was that the wife developed an invincible repugnance to sexual intercourse after a difficult confinement and then spent nearly three years in a mental hospital. The husband wrote to her in hospital with the intention of preventing her from returning to live with him, and a maintenance order was obtained by the wife in October 1954 on the basis that this letter constituted desertion by the husband. After the wife had left hospital and gone to live with her mother, the husband made a genuine offer to take her back, but this was refused. In August 1957 the husband obtained the discharge of the order on the ground of his offer to resume cohabitation,[26] but he continued to make voluntary payments to her for a few weeks. These payments ceased in September 1957. In January 1958 she sought a new order from the stipendiary magistrate for Kingston-upon-Hull on the ground of wilful neglect.

From medical evidence before the stipendiary it appeared that the wife's neurosis now manifested itself as an overwhelming aversion to the proximity of the opposite sex and that even a return to sexless cohabitation with her husband might induce a serious mental relapse. On these facts the stipendiary found that the husband was under no liability to maintain his wife because he was not guilty of any matrimonial misconduct and that the wife was herself in desertion; accordingly he dismissed her complaint.

The Divisional Court (again composed of Lord Merriman P. and Hewson J.) upheld the stipendiary's decision but on different grounds. In a reserved judgment the President decided that it was not right to hold that the wife was a deserter, as her neurotic state prevented her from making a rational decision whether to return to cohabitation or to desert. On this point he referred to the guidance given by the Court of Appeal in *Keeley* v. *Keeley*[27] regarding the capacity of a patient in a mental hospital to form or retain an *animus deserendi*, guidance which he felt was no less appropriate here although the wife was no longer in hospital.

On further appeal the Court of Appeal (Hodson, Sellers and Harman L.JJ.) reverted to the view taken by the stipendiary and found that the wife was in desertion: it followed that the husband was not guilty of wilful neglect to maintain her. Hodson L.J., delivering the judgment of the court, concluded that the evidence showed her to be capable of making a rational decision to desert, as, in the words of the only medical witness, "her condition was neurotic rather than psychotic." Whatever the medical validity of

[25] [1958] 3 All E.R. 528.

[26] But at the same time as this order was discharged a new order was made under the Guardianship of Infants Acts giving custody of the child of the marriage to the wife and ordering the husband to pay maintenance of 30s. a week in respect of the child, which payments the husband had always kept up.

[27] [1952] 2 T.L.R. 756.

this distinction—and the learned Lord Justice admitted that it was a hard case—the *ratio decidendi* of the Court of Appeal is in conformity with accepted principles and calls for no special comment here. What is of particular interest for our purpose is rather the *obiter dictum* of the court that, if the wife had *not* been in desertion, the husband would have been guilty of wilful neglect to maintain her. For on this hypothesis, the Court of Appeal would have reached a decision directly contrary to that of their brethren in the court below where both the President and Hewson J., after finding no desertion by the wife, proceeded to hold the husband guilty of wilful neglect to maintain her when he ceased his voluntary payments.

The Reasoning in *Lilley*

This important clash of judicial opinion, which *Lilley* unfortunately leaves unresolved, justifies a closer examination of the reasoning upon which the two judgments in the Divisional Court and the dictum in the Court of Appeal were professedly based.

Before the Divisional Court, counsel for the wife had argued that, if she was not in desertion, then logically the husband must be guilty of wilful neglect, and he found support in *Jones* v. *Newtown and Llanidloes Guardians*, *Tulip* v. *Tulip* and *N.A.B.* v. *Parkes*[28]; and particularly in the judgment of Denning L.J. in the last case.

Lord Merriman pointed out that both *Jones* v. *Newtown, etc.*, *Guardians* and *N.A.B.* v. *Parkes* were concerned with the liability of the husband to the Poor Law guardians or the National Assistance Board, not that of the husband to his wife, and he referred to his previous judgment in *Pinnick* v. *Pinnick*[29] where he had emphasised the distinction between claims against a husband under the National Assistance Act, 1948, ss. 42 and 43, and those brought under the Summary Jurisdiction Acts, 1895–1949. He reaffirmed the view there expressed that cases such as *Baker* v. *Baker*, brought under the latter Acts, had not been overruled by *N.A.B.* v. *Parkes*, and that these cases were not in conflict with *Tulip* v. *Tulip*, as they dealt with the question of the entitlement of a separated wife to maintenance whereas *Tulip* v. *Tulip* dealt with the reasonableness of the amount in the case of an agreed separation.

It may be remembered that the line of cases to which the President referred establish that a consensual separation takes away both at common law and under the Summary Jurisdiction Acts the wife's right to maintenance, unless she can prove that her husband has undertaken expressly or impliedly to continue to maintain her notwithstanding the separation. On the other hand, in *N.A.B.* v. *Parkes*, Denning L.J. was of the opinion that a consensual separation,

[28] [1920] 3 K.B. 381; [1951] P. 378; [1955] 2 Q.B. 506.
[29] [1957] 1 All E.R. 873 (discussed in (1957) 20 M.L.R. 404).

even if *not* accompanied by any agreement for maintenance, did not disentitle the wife from subsequently seeking an order against the husband on the ground of his wilful neglect to maintain her, should her circumstances change and these circumstances be brought to his notice: " the principle in *Tulip* v. *Tulip* . . . overrides anything said previously in *Baker* v. *Baker*." [30]

Lord Merriman proceeded to find that in the present case there was neither an agreement of the spouses to live apart nor any undertaking by the husband that his wife should be maintained as a " separate " wife. He then went on:

> " The husband is admitted not to be in desertion, and I am assuming that the wife also is not so. The wife only attempts to justify her refusal to cohabit on a ground which involves 'no matter of complaint against her husband.' [31] In my opinion we should not be justified in abandoning the principles laid down by this court in *Baker* v. *Baker*,[32] *Stringer* v. *Stringer*,[32] *Starkie* v. *Starkie* (*No. 2*) [32] and other cases, or by the Court of Appeal in *Chapman* v. *Chapman*,[33] and by the majority of the Court of Appeal in *Price* v. *Price*,[34] in which case Hodson L.J. said:
>
> > 'the question of the wife's right to maintenance may depend on whether she is a deserter or whether she is deserted or whether there is a contract between them. I do not think that the law recognises a sort of undefined condition where the parties are living apart in conditions which may be described as of drift, or in some not very clearly defined condition in so far as rights to maintenance are concerned.'
>
> " Nor do I think that we ought to ignore the line of decisions in this court that wilful neglect to provide reasonable maintenance involves an element of misconduct—and to do both on the strength of a dictum that the wife is entitled to maintenance because she is a wife, and that *Baker* v. *Baker* and the other cases I have mentioned are overriden."

Having therefore found against the wife, the President pointed out that " the true solution " of the impasse would be for the National Assistance Board to obtain an order in the wife's favour by virtue of the husband's express liability for maintenance under the Act of 1948, which order would not, in his view, necessarily impute a finding of wilful neglect.

Hewson J. agreed with the President that neither party was in desertion. " Neither party has a legitimate ground of complaint against the other and I cannot see that the husband can be found guilty of wilful neglect to provide reasonable maintenance for his

[30] At 517; for a full discussion of this case, see Brown, " Separation Agreements and National Assistance " (1956) 19 M.L.R. 623.
[31] Citing 12 Halsbury's *Laws* (3rd ed.) 482, para. 1077 (the passage is set out *in extenso* above at p. 4).
[32] See note 15 above.
[33] April 7, 1951, unreported.
[34] [1951] 2 All E.R. 580n.

wife, for, on the evidence, I see no element of misconduct in his attitude."

The Court of Appeal, although, as we have seen, taking a different view of the wife's conduct on the facts, reaffirmed that, whatever might be the husband's position as against the National Assistance Board, as between husband and wife the husband could not be found guilty of wilful neglect unless he was a wrongdoer and that his wrongdoing might consist in the very fact of a failure to maintain without just cause: there need be no other matrimonial offence imputed to him. It followed, in the court's view, that, if the wife had not been in desertion, the husband would have committed the offence of wilful neglect because his duty to maintain her persisted despite the *de facto* separation compelled by the wife's mental state; for "this duty must surely subsist if separation is forced upon the parties by illness which compels residence in hospital, and this would be the same whatever the nature of the illness, even if it be mental disorder, provided always that the intention of the absent spouse to return to the other continues."

With this reasoning may be contrasted that in the Divisional Court where the President's decision is professedly based on two grounds. The first is that the case falls within the principles laid down in the *Baker* line of cases. The second is that the husband's behaviour lacks any element of misconduct. With respect, it is not easy to understand the first ground. For, granted that the cases referred to are still good law despite *N.A.B.* v. *Parkes*, they only decide that upon a consensual separation the wife cannot complain of wilful neglect by the husband unless she can prove that he undertook liability for her continued maintenance. This is the only principle to be extracted from these cases. It flows naturally from the proper reluctance of the courts to interfere with the spouses' private bargain to live apart and cease to look to each other for support: only where the husband had undertaken some liability for maintenance, as in *Tulip* v. *Tulip*, would the courts interfere with the spouses' agreement. Although the Maintenance Agreements Act, 1957, has now enlarged the courts' powers to enable them to insert maintenance provisions in a separation agreement which did not provide for maintenance, there must still be a separation agreement before that Act can apply.[35]

But in the present case no question of a consensual separation arises. It is hard to see therefore how the *Baker* line of cases can be relevant to the present decision. And if the wife has not bargained away her right to maintenance in a separation agreement, why should the court take this right from her, unless she has forfeited it by her own misconduct? Lord Merriman would deprive her of the right, not be it noted, because of any misconduct on her part, but because of the absence of misconduct on the part of the husband.

[35] *Ewart* v. *Ewart* [1958] 3 All E.R. 561.

The absence of misconduct by the husband is the second ground put forward by the President and the only ground given by Hewson J. With great respect, in both judgments it is not easy to see what precisely was the meaning of this ground.

The difficulty stems from their incomplete analysis of the offence of wilful neglect. It is hardly a sufficient explanation for rejecting the wife's complaint simply to state that Mr. Lilley's neglect lacked an element of misconduct. For how then can this case be reconciled with the reasoning in *Jones* where the same court held that a sufficient element of misconduct exists if the husband knows of his wife's reduced circumstances and neglects to provide for her? Mr. Lilley certainly could not deny his knowledge of his wife's reduced circumstances seeing that they arose from his own act in withdrawing her allowance.

The true distinction between these two cases, assuming, as the Divisional Court did, that neither of the wives was in desertion, was one to which neither of the judges in the Divisional Court adverted and which emerges only when we examine more closely what is meant by this element of misconduct.

THE ELEMENT OF MISCONDUCT

The term "element of misconduct" is none other than *mens rea* in civil dress. In the modern law wilful neglect is both a matrimonial offence and a crime, and historically, as we have seen, it was a crime long before it became a matrimonial offence. It is not therefore surprising that the courts have imported into the civil offence the same mental ingredient that they have always required for the crime.

This ingredient is wilfulness. A learned writer has explained that statutory offences which incorporate wilfulness in their definition are usually interpreted by the courts as requiring proof of a knowingly wrongful act, that is to say, that "the accused did the prohibited act with knowledge of the circumstances which constitute the offence."[36] In the view of the same writer this interpretation has long been applied to the crime of wilful neglect to maintain a wife under the Vagrancy Act, 1824, and has recently been extended to the analogous matrimonial offence.[37]

What then are the circumstances which constitute the offence of wilful neglect and of which the husband must have knowledge? Presumably, they are:

(1) that the wife is entitled to maintenance;
(2) either (a) that she is in need, or, in certain special cases,
(b) that she is in need by reason of a deterioration in her financial position;

[36] Edwards, *Mens Rea in Statutory Offences* (1955), p. 29. Likewise Glanville Williams, *Criminal Law: The General Part* (1953) at p. 115: "Wilfulness in criminal law implies knowledge of the circumstances that are relevant to the offence."

[37] *Op. cit.*, pp. 33–34.

(3) that the husband is not providing her with reasonable maintenance having regard to all the circumstances, including her need and his own means.

It follows logically that, if the husband is under a genuine but mistaken belief that one or more of these circumstances is absent, then *mens rea* is negatived and his conduct cannot be considered wilful. But where there are no reasonable grounds for his belief the court may decide that it is not a bona fide belief and ought therefore to be disregarded.[38]

With regard to (1) the husband is deemed to know the law and that he is under prima facie liability for his wife's maintenance: the burden therefore is upon him to prove that the wife has disentitled herself to maintenance either by matrimonial misconduct, such as adultery or desertion, or by the terms of a consensual separation. The special cases referred to in (2) (b) are those already discussed in relation to consensual separations. With regard to (3), it is for the court to decide whether the maintenance is reasonable in all the circumstances, but the husband's bona fide but mistaken belief that the maintenance provided by him is reasonable should, in principle, afford a complete defence.

Admittedly, not all the cases on wilful neglect can be fitted into this rationalisation, but at least there seems to be a general acceptance of the principles on which it rests.

Applying then the above analysis to the case of *Lilley*, we see that, if (as the Divisional Court found) the wife was not in a state of desertion, nevertheless the husband's conduct did not amount to wilful neglect for the reason that he had a bona fide but mistaken belief that his wife was in that state and so disentitled to maintenance. In support of this defence is *Morris* v. *Edmonds* [39] where the prosecution of the husband under the Vagrancy Act, 1824, was dismissed upon proof that he had a bona fide belief on reasonable grounds that his wife had committed adultery. The same defence was accepted by Lord Merriman P. in *Chilton* v. *Chilton* [40] on a complaint of wilful neglect under the Summary Jurisdiction Acts. There would seem no legal or logical justification for limiting this defence to a belief in adultery: a belief in any other misconduct which (if true) would disentitle the wife to maintenance ought equally to provide a defence.

When the proceedings against Mr. Lilley were before the Divisional Court, the bona fides of his belief could hardly be doubted seeing that the learned stipendiary actually found Mrs. Lilley to be a deserter. But if the wife were to go back with a fresh complaint, she would then surely succeed, precisely as Lord

[38] *Wilson* v. *Inyang* [1951] 2 All E.R. 237 (a prosecution under the Medical Act, 1858, s. 40).

[39] (1897) 77 L.T. 56.

[40] [1952] P. 196. In *Glenister* v. *Glenister* [1945] P. 30 it was accepted also as a valid defence to a charge of desertion: see Bevan, "Belief in the Other Spouse's Adultery" (1957) 73 L.Q.R. 225.

Merriman foresaw that Mrs. Jones would succeed on a second complaint. For a belief ceases to be held bona fide once a court has found that the belief is mistaken.[41] It is therefore somewhat strange that the only advice which the Divisional Court appear to proffer to the unfortunate Mrs. Lilley is that she should enlist the cudgels of the National Assistance Board on her behalf. On principle it would seem undesirable for this circuitous route to be followed to reach the same goal: the husband's proper maintenance of his wife; an issue of maintenance ought to be settled directly in the manner and by the machinery provided by the Summary Jurisdiction Acts, not smuggled into the same court under the cloak of the National Assistance Board.

Thus, on the view of the facts taken by the Divisional Court, the true distinction which should have been drawn between *Lilley* and *Jones* was that in the first case the husband was genuinely unaware of circumstance (1) above, whereas in the second case he had no knowledge of circumstance (2). In both cases this lack of knowledge meant he lacked the *mens rea* requisite for the offence of wilful neglect. Subjected to the same analysis, the dictum of the Court of Appeal in *Lilley* must, with great respect, be rejected as unsound.

The Divergent Approaches

Apart from the issue of wilfulness, the two cases also bring out again the sharp conflict of view between Lord Merriman and Lord Denning in regard to the *Baker* line of cases and to the effect of a consensual separation. This conflict arises from the fact that the former is adopting the *mens rea* approach appropriate to cases of wilful neglect under the Summary Jurisdiction Acts, whereas the latter is applying to the same factual situation the very different approach now given legislative sanction in the National Assistance Act.

Much of the present complexity, and even confusion, in the law of family maintenance can be traced back to this same fundamental difference in approach. Unfortunately, the question of maintenance is still entangled with the outworn concept of the matrimonial offence. Where the marriage is directly in issue before the High Court, the current of opinion is moving against the analysis of a broken marriage simply in terms of a matrimonial offence.[42] Yet in the magistrates' courts, where far more matrimonial disputes are litigated, the prevalence of this approach has passed almost unremarked.[43] In the quasi-criminal atmosphere of what the public

[41] *Allen* v. *Allen* [1951] 1 All E.R. 724, a case now hard to reconcile with the reasoning in *Wilson* v. *Inyang* (above).

[42] Even among the conservative-minded members of the Royal Commission on Marriage and Divorce, nine were in favour of adding a new "breakdown" ground for divorce, and one (Lord Walker) proposed the total abandonment of the doctrine of the matrimonial offence as the basis of divorce (see Cmnd. 9678, paras. 70–71 and pp. 340–341).

[43] Thus, it is taken for granted by the members of the Royal Commission, except Lord Walker, who, while rejecting the matrimonial offence as the basis of

commonly regard as "the police court" it is hardly surprising that the concept of the matrimonial offence still flourishes. Moreover, the concept is too firmly embedded in the Summary Jurisdiction Acts, where many of the wife's grounds of complaint are at the same time criminal offences, for the courts to be able to cast it off in favour of a more enlightened attitude.

In 1948, however, a new legislative approach was discernible. In the quite different context of social welfare legislation, section 42 of the National Assistance Act spoke, not negatively in terms of an offence or default, but positively in terms of a liability or duty—a duty to maintain one's family. Unfortunately as proceedings to enforce this provision have come before the magistrates' courts, they, with the seeming acquiescence of the Divisional Court, have tended to translate the positive duty into the familiar language of the matrimonial offence. The translation has not escaped judicial criticism, and in *N.A.B.* v. *Parkes* Denning L.J. made a gallant attempt to get back to the original text by asserting the principle of the wife's inherent right to maintenance by virtue of her status as a wife.

The present confusion will remain until the courts give up the unequal struggle of trying—as in *Jones* and *Lilley*—to bring together what are two essentially divergent legislative approaches to the one factual situation. Short of new legislation,[44] the approach via the Summary Jurisdiction Acts cannot now be other than in terms of the matrimonial offence and of wilfulness or *mens rea* on the part of the husband, and this article has sought to clarify what this entails. But in proceedings under the National Assistance Act a new and more realistic approach ought to prevail, whereby the husband is to be regarded as liable for his wife's support unless or until she forfeits her right by her own misconduct. And this duty of the husband—being a duty owed to the National Assistance Board (alias the taxpayer) as much as to the wife—should not be displaced by any private bargain between the spouses nor by any mistaken beliefs of the husband about his wife's behaviour.

Finally, one may sound a note of caution. Because of the entanglement of complaints by the wife under the Summary Jurisdiction Acts with the concept of the matrimonial offence, the courts may be tempted (as in *Lilley*) to avoid this thicket by encouraging a complaint by the National Assistance Board under the Act of 1948. This however would be a regrettable development. For it is obviously better that the wife should seek her own remedy directly under the machinery provided by the former Acts and, if possible, *before* she has had to suffer the degradation of a resort to national assistance. The National Assistance Board itself takes this view,

divorce, expressed his approval of the doctrine in matters of separation and maintenance (at p. 340).

[44] But the Matrimonial Proceedings (Magistrates' Courts) Bill, with its enumeration of "causes of complaint," clings to the old principle.

its declared policy being to encourage the wife, wherever possible, to bring her own complaint against her husband. Only in exceptional cases, namely, where the husband's conduct lacks the necessary element of wilfulness and the wife's conduct has not disentitled her to maintenance, should the indirect method of a complaint by the Board be followed in order to achieve the same practical result—a court order against the husband to provide for his wife. The precise ambit of the offence of wilful neglect remains therefore an important question, to which, regrettably, the latest cases have not produced an authoritative judicial answer.[45]

* L. NEVILLE BROWN.

[45] Nor does the new Bill clarify the problem.

* M.A., LL.B.(Cantab.); Dr. en Droit (Lyon); Senior Lecturer in Comparative Law, University of Birmingham.

PROBLEMS OF THE COLLECTING BANK

In the course of his judgment in *Lloyds Bank, Ltd.* v. *Savory & Co.*,[1] Lord Wright said that a banker can safely assume that most cheques which he receives for collection are honestly come by. It is unlikely that any judge could give unqualified support to that dictum today, because the statutory protection given to collecting banks by section 4 of the Cheques Act, 1957,[2] only applies if the bank is able to show it has acted without negligence, and, as the law stands at present, a collecting bank is rarely safe in assuming that " third party " cheques are honestly come by. When a bank is asked by a customer to collect a cheque in which the payee is a third party, the bank is normally put on inquiry. If it turns out that the bank's customer has no right to the cheque because, for example, his title rests on a forged indorsement, the bank will be liable in conversion to the true owner for the value of the cheque, unless it can show it made sufficient inquiry, including perhaps, inquiry of the payee.

Section 4 (1) of the Cheques Act, 1957, reads:

> " Where a banker, in good faith and without negligence,—
> (*a*) receives payment for a customer of an instrument to which this section applies; or
> (*b*) having credited a customer's account with the amount of such an instrument, receives payment thereof for himself;
> and the customer has no title, or a defective title, to the instrument, the banker does not incur any liability to the true owner of the instrument by reason only of having received payment thereof."

Subsection (2) applies this provision to cheques, bankers' drafts, conditional orders drawn on banks, and documents drawn by a public official intended to enable a person to obtain payment from the Paymaster-General or the Queen's and Lord Treasurer's Remembrancer.

This article is concerned principally with the application of section 4 to cheques; and with regard to cheques, the section replaces section 82 of the Bills of Exchange Act, 1882,[3] as amended by the

[1] [1933] A.C. 201, 229.
[2] 5 & 6 Eliz. 2, c. 36.
[3] 45 & 46 Vict. c. 61. If the drawer's signature is forged, a cheque is a nullity, and it would seem clear, therefore, that a collecting bank could not claim the statutory protection of s. 4. There are also dicta to the effect that a fraudulent alteration of the amount of a cheque would render the cheque not a cheque for the purposes of s. 4, and deprive the bank of its protection irrespective of negligence: Scrutton L.J. in *Slingsby* v. *District Bank, Ltd.* [1932] 1 K.B. 544, 559, and Devlin J. in *Chao* v. *British Traders and Shippers, Ltd.* [1954] 1 All E.R. 779, 787. Mr. Maurice Megrah has forcefully criticised this view in an article, " When is a cheque not a cheque: the liability of a collecting banker ": (1959) 228 L.T., p. 145.

Bills of Exchange (Crossed Cheques) Act, 1906,[4] although the protection for collecting banks provided by section 4 now extends to uncrossed as well as crossed cheques. This removed an historical anomaly which had no real justification.[5]

Like the old section 82, however, section 4 is only a protection to a collecting bank, in an action brought against it for conversion, if it can show it has acted *without negligence*, and the courts today have to interpret that phrase according to the precedents handed down by courts who have had to interpret the same phrase in section 82. The Mocatta Committee in its Report on Cheque Endorsements, in 1956,[6] had recommended that the statutory protection for collecting banks under section 82 be extended to uncrossed cheques, but made no suggestion for relieving collecting banks of their obligation to prove they have acted "without negligence," which obligation, as we shall seek to show, is a heavy one.[7]

Before examining to what extent section 4 of the Cheques Act is a protection to a collecting bank, it is worth disposing of one controversial matter, the provision in section 4 (3):

> "A banker is not to be treated for the purposes of this section as having been negligent by reason only of his failure to concern himself with absence of, or irregularity in, indorsement of an instrument."

The main purpose of the Cheques Act was, of course, to do away with the need for a payee to indorse a cheque before paying it into his own bank account. Clearly, by section 4 (3), if a collecting bank is collecting a cheque for its customer and the customer is the payee on the face of the cheque, there is no obligation on the bank to concern itself with the absence of, or irregularity in, an indorsement.

The way in which the subsection is worded, however, caused Lord Chorley, in the House of Lords debate on the provision, to take the view that it also protected a bank collecting for a person

[4] 6 Edw. 7, c. 17.

[5] See Dr. J. Milnes Holden, *History of Negotiable Instruments in English Law*, pp. 320–321. The only justification there might be for the distinction was that a collecting bank was bound to collect crossed cheques, whereas the bank's intervention in the case of uncrossed cheques was voluntary (for the convenience of the customer). (See Paget's *Law of Banking* (5th ed., 1947) by Maurice Megrah, p. 161.) But the anomaly is apparent when you consider that, prior to the Cheques Act, if a bank collected two cheques, one crossed and one uncrossed, and the customer had no title to either, the bank could only claim protection under s. 82 with regard to the crossed cheque. Then again, if the bank had asked the customer to cross the uncrossed cheque before paying it in, it would have got protection, but not if it had crossed it itself.

[6] Cmnd. 3, para. 105.

[7] Indeed, the Committee seems to have underestimated the obligation, in thinking that the collecting bank need only watch for "possibly suspicious circumstances," such as the employee of a company presenting for the credit of his personal account a cheque payable to his company and indorsed in blank by the company (para. 99). Such an example is merely one of the more obvious instances where a collecting bank is put on its guard.

who has become a holder by negotiation.[8] But surely, if a bank is collecting for a holder who is not the payee on the face of the cheque, it is still, as it always has been, under an obligation to look at the back of the cheque to see that there is an indorsement (or there are indorsements) connecting the payee with the holder, and on which the holder's right to the cheque depends. The Cheques Act has not obviated the need for indorsement when an order cheque is negotiated. If there is an absence of, or an irregularity in, an "essential" indorsement, a bank which collected after failure to notice or ignoring the irregularity or absence would be "negligent."[9] This was the view of Viscount Hailsham in the debate, and the Committee of London Clearing Bankers, in a leaflet issued in September 1957, point out that, in the case of cheques tendered for the credit of an account other than that of the ostensible payee, indorsement of the payee and any subsequent indorsee will be required under the new Act, but not the indorsement of the customer for whose account the cheque is collected. This being the banks' own declared practice, it would seem to strengthen the view that failure to concern itself with indorsements in the case of "third party" cheques would be negligence.[10]

A collecting bank's obligations as seen in 1933

Where a bank has collected a cheque for a customer who had no right to it, unless the collecting bank can show it is a holder for value or holder in due course (which is considered below),[11] the bank's only defence to an action for conversion is section 4, and the success of that defence depends on whether the bank can prove it has acted "without negligence." It would seem that the value of this protection is very much less today than it once was. When Lord Wright stated in 1933 that generally a bank can safely assume that most cheques it receives for collection are honestly come by, his only proviso was that there are "certain well-recognised circumstances" which should put a bank on its guard, and certain well-known precautions which a bank should adopt in connection with a customer's account.[12] It remains to be seen whether the position is now reversed with Lord Wright's "safe assumption" now the exception rather than the general rule.

The circumstances already established in 1933 which would put a collecting bank on its guard were tolerably clear and reasonable.

[8] *Hansard*, Lords Debates, vol. 204, col. 687.

[9] This had been the law before the Cheques Act: *Bavins* v. *London and South Western Bank* [1900] 1 K.B. 270.

[10] The Mocatta Committee had proposed that where the bank's customer was not the payee, the bank could not dispense with the need to watch for the absence of indorsement: para. 99. See also Sheldon, *The Practice and Law of Banking* (8th ed., 1958), p. 57.

[11] See p. 28, *infra*.

[12] In *Lloyds Bank, Ltd.* v. *Savory & Co.* [1933] A.C. 201, 229.

We have mentioned one instance—irregularity in or absence of an indorsement on which the customer's title depends. Another circumstance which "bears on its face a warning that the customer may have appropriated it," said Lord Wright, was where a customer known to be a servant or agent pays in for collection a cheque drawn by third parties in favour of his employer or principal. Such a case was *Hannan's Lake View Central, Ltd.* v. *Armstrong & Co.*,[13] where the secretary of the plaintiff company paid into his own account at his bank a cheque drawn in favour of the company, but fraudulently indorsed by the secretary. The bank had made no inquiries as to the secretary's rights with regard to the cheque. Kennedy J. held that the bank was negligent within the meaning of section 82 and, therefore, liable for the amount of the cheque to the company. Of course, it follows that a bank should make it its business to inquire the name of its customer's employer when opening an account for a customer, and such is the invariable practice. Presumably, the customer's answer to such an inquiry should be verified with the alleged employer, and any other reference followed up.[14] But the problem is whether this duty to ascertain the name of a customer's employer is just a once and for all duty, or whether the bank should periodically check up to see whether the customer has changed his employer or not. It may seem unreasonable to impose on a bank a continuous duty to be *au fait* with the customer's employment,[15] but is it reasonable for a bank to assume its customer is still in the same employment as, say, twenty or thirty years ago? Would it be negligent to assume this?

The *Savory* case itself established (albeit by a majority of three to two) that failure to inquire what were the occupation and circumstances of the customer's husband amounted to negligence. As Dr. Milnes Holden has wondered, would it ever be held that a bank, when opening an account for a man known to be married, ought to make a similar inquiry with reference to his wife?[16] Lord Blanesburgh, in his dissenting judgment in the *Savory* case, said that such a proposition would strike him as "extravagant."[17]

A similar type of case mentioned by Lord Wright as an obvious one where a bank is put on its guard was that exemplified by *Underwood (A. L.), Ltd.* v. *Bank of Liverpool*,[18] where a cheque was made payable to a one-man company and was paid in by the "one man," who was also the managing director, into his private account.

[13] (1900) 16 T.L.R. 236.
[14] See, for example, *Turner* v. *London and Provincial Bank, Ltd.* (1903) *Journal of the Institute of Bankers*, vol. xxiv, p. 220, and *Ladbroke & Co.* v. *Todd* (1914) 111 L.T. 43.
[15] See Paget's *Law of Banking*, p. 300.
[16] "Suggested reform of the law relating to cheques" (1951) 14 M.L.R. 33.
[17] [1933] A.C. 201, 219.
[18] [1924] 1 K.B. 775.

Another type of case is where an employee pays into his own account a cheque drawn by his employer in favour of third parties and apparently indorsed by them. It shows again the duty of a bank to make it its business to know the name of its customer's employer.

There are other instances in the reports where the terms of the cheque themselves were held to raise a doubt in the mind of a bank cashier of ordinary intelligence and care as to whether the customer had a good title to it. For example, in *Ross* v. *London County Westminster and Parr's Bank, Ltd.*,[19] cheques were drawn payable to the Officer in Charge, Estates Office, Canadian Overseas Military Forces, and indorsed generally by that officer. A sergeant employed at the Estates Office paid them into the defendant bank without the bank making any inquiry as to whether he was entitled to the cheques. The judge had no difficulty in concluding that, as the cheques had been made payable to a public official, the bank should have been put on inquiry as to whether their private customer was entitled to the cheques. Sufficient inquiry must, one assumes, have included inquiry of the payees.

A collecting bank's practice in handling cheques drawn in favour of companies

None of the various instances referred to by Lord Wright in 1933 could really be regarded as imposing an unduly heavy burden on collecting banks. Indeed, the decisions encouraged banks to introduce procedures for making suitable inquiries when handling third party cheques that have been beneficial.[20] The standard of care required of a collecting bank was stated by Lord Warrington in *Savory's* case as being judged " by reference to the practice of reasonable men carrying on the business of bankers and endeavouring to do so in such a manner as may be calculated to protect themselves and others against fraud."[21] Sankey L.J. (as he then was) made the point in *Lloyds Bank, Ltd.* v. *Chartered Bank of India, Australia and China*,[22] that a bank could not be held liable for negligence merely because it has not subjected an account to a microscopic examination. Bank officials, he felt, did not have to be " amateur detectives."

In time, fewer third party cheques could be collected by banks with safety, and it may well be that the very precautions which

[19] [1919] 1 K.B. 778.

[20] Lord Chorley has written: " The whole system (of safeguards in connection with handling cheques) which has been built up in response to a number of legal decisions which have gone against the banks furnishes an admirable illustration of the way judicial decisions can under the common law system influence business men so to conduct their operations as to protect the interests of the commercial world and indeed of the public as a whole ": (1955) 18 M.L.R. 401.

[21] [1933] A.C. 201, 221, and quoted with approval by McNair J. in *Bute* v. *Barclays Bank, Ltd.* [1955] 1 Q.B. 202, 214.

[22] [1929] 1 K.B. 40, 73.

the banks took to protect themselves from charges of negligence imposed a greater burden upon them. Because the banks in practice became more cautious and inquiring, the courts exacted a greater obligation to be cautious and inquiring before allowing them the protection of section 82.

In 1926, MacKinnon J. (as he then was) refused to accept the idea that whenever a named payee was a limited company and the cheque had been indorsed by that company, the bank collecting on behalf of the indorsee was put on inquiry.[23] But the banks themselves forbade their staff to accept for private accounts without inquiry cheques drawn in favour of limited companies, not just where the customer was an employee of the company, but where there was no such connection at all between the company and the indorsee, who asked his bank to collect for him.[24]

In *Motor Traders' Guarantee Corporation, Ltd.* v. *Midland Bank, Ltd.*,[25] Goddard J. (as he then was) had to consider a case where a customer of the defendant bank asked the bank to collect a cheque made payable to a firm of motor-dealers (not a limited company) whose indorsement the customer had forged. The bank cashier asked the customer if he had obtained the cheque from the payees, to which question the customer answered in the affirmative.[26] The bank made no inquiry of the payees as to their customer's right to the cheque. Goddard J. held that the bank was negligent. There were special factors in the case as the past banking history of the customer—thirty-five cheques had been dishonoured in a year—was such that the bank should have made further inquiry. Goddard J. expressly said that had the customer's banking history been different, he would probably have held that no further inquiries need have been made. The case is not, therefore, any authority for saying that, as a general rule, when a bank is asked to collect for a customer a cheque drawn in favour of a firm, the bank is invariably put on inquiry. It is difficult therefore to go the whole way with the view expressed in *Paget on Banking* that this decision went further than any other to detract from the value to collecting banks of section 82.[27]

Following the growing practice, the defendant bank in that case did make some inquiry, admittedly a very minor one, of their customer's right to the third party cheque, although there was no question of the customer being the servant or agent of the firm concerned (the payees). This practice to make some inquiry where the payee was a limited company, or perhaps any sort of firm or

[23] In *London and Montrose Shipbuilding and Repairing Co., Ltd.* v. *Barclays Bank, Ltd.* (1926) 31 Com.Cas. 67; affirmed, 31 Com.Cas. 182, C.A.

[24] See Paget, *op. cit.*, p. 304.

[25] [1937] 4 All E.R. 90.

[26] "Not a very valuable question to ask," as Goddard J. said (at p. 96).

[27] Paget, *op. cit.*, p. 305, though it is true, as this book points out, that dishonoured cheques do not necessarily imply dishonesty.

company, received the support of Goddard J. in 1932, before his elevation to the bench [28]:

> "As the cases stand at present the only prudent course is for bankers to refuse to accept, without inquiry or special instructions, cheques made payable to companies for accounts other than those of the payee."

In spite of the reference "to cases as they stand at present," the advice had not really any authority to back it and Goddard J.'s own decision in 1937 was no authority either. However, this growing practice of the banks to make some inquiry of a customer's rights to a third party cheque where the payee is any kind of company or firm seems now to have become transposed into a duty on the bank to make sufficient inquiry in such cases if it is to have the statutory protection of what is now section 4 of the Cheques Act. In other words, it may now be negligent for banks not to follow what has become regular banking practice—to inquire a customer's rights to a third party cheque.[29] At any rate, this is so unless it is an isolated event or for a small sum [30]; we shall see whether that proviso is of any importance. Another problem is, does sufficient inquiry require, *inter alia*, inquiry of the payees of the cheque?

In *Penmount Estates, Ltd.* v. *National Provincial Bank, Ltd.*,[31] the plaintiffs were payees of a cheque drawn by the War Damage Commission, and sent to a firm of surveyors who had been acting on the plaintiffs' behalf. A fraudulent employee of the surveyors forged the plaintiffs' indorsement and asked B to cash the cheque for him. B, in his turn, took the cheque to A, a solicitor. A paid the cheque into his clients' account with the defendant bank, who collected the cheque for him. An official of the defendant bank had told the solicitor he did not like to accept it, hesitating because he could not imagine the plaintiffs had no banking account of their own. The solicitor was asked for an explanation as to how the cheque came into his possession and he replied that he had arranged for cheques from the Commission to be indorsed by his clients and paid into his clients' account by him, and that he then sent them cheques for the amount less his fees. The bank made no inquiry of the payees. MacKinnon L.J., sitting as a judge of first instance, held the bank had not been negligent and were entitled to the protection of section 82. The judge agreed there was reason

[28] (1932) *Journal of the Institute of Bankers*, vol. liii, p. 76.

[29] Mr. Maurice Megrah has written: "Although at no time has departure from practice, either as it is recognised generally or as applied *ad hoc* in special circumstances, been held of itself to be negligence, yet more than once it has been thought to point to the possibility of negligence sufficiently strongly to require the bank to justify the departure": Megrah, "The Decline and Fall of Section 82" (1956) *Journal of the Institute of Bankers*, vol. lxxvii, p. 256, at p. 259.

[30] See Devlin J. in *Baker* v. *Barclays Bank, Ltd.* [1955] 1 W.L.R. 822, 825.

[31] (1945) 173 L.T. 344.

to believe that the solicitor was "not a very reputable solicitor," but:

> "he was a solicitor, and he was keeping, under statutory conditions, a clients' account, and it would be natural that he should be paying into such an account the money of people other than himself. . . . It is true that, in the light of after events, the explanations given by A may sound improbable to anyone in a suspicious frame of mind; but in my opinion, the officials of the bank, doing their duty under section 82, have not to be abnormally suspicious." [32]

Of course, with respect, it is a matter of opinion whether it would have been "abnormally suspicious" for the bank to inquire of the payees whether this solicitor, of dubious reputation, had a right to the cheque. However, presumably MacKinnon L.J. would have found negligence if there had been no inquiry at all, and it was only the special case of a solicitor having a clients' account, the very purpose of which is to pay in other people's money, that made A's explanation reasonable. In any other case, the likelihood of a firm or company having its own banking account would have made such an explanation extremely unlikely. Can a bank today ever be sure it had adequately satisfied section 4 unless it made inquiry of the payees?

A hardening of the judicial attitude

A hardening of the judicial attitude towards the statutory duty of a collecting bank is apparent in the case of *Baker* v. *Barclays Bank, Ltd.*[33] The plaintiff and one Bainbridge carried on a partnership under the name of "Modern Confections." Normally, cheques were indorsed by both of them for payment into the partnership account, but each had authority to indorse alone. Bainbridge appropriated cheques to the value of £1,160, all drawn in favour of "Modern Confections," indorsed by Bainbridge alone and handed by him to J. J. paid them into his account at the defendant bank. The manager of the bank sought an explanation of J. when the second such cheque was paid in and J. told him that Bainbridge was the sole partner of "Modern Confections," that he, J., was helping with the financial side, and that J. would be able to reimburse himself money owed by Bainbridge to J. by running the financial side. The bank accepted this explanation and made no inquiry of Bainbridge. Earlier, J. had paid in cheques where Bainbridge himself was the payee and substantial sums had been drawn out. Devlin J. held, *inter alia*, that the bank could not claim the protection of section 82 as it had been negligent in not making sufficient inquiries.

Devlin J. recognised that "of course, cheques are indorsed over to third parties, but usually for small sums and only occasionally.

[32] (1945) 173 L.T. 344, 346.
[33] [1955] 1 W.L.R. 822.

When the bank manager sees it happening for large sums and quite regularly, I think that he is put on inquiry." [34] Inquiry was made of the second cheque drawn in favour of "Modern Confections," but the judge did not think that J.'s explanation was one which should have satisfied a bank manager and caused him to refrain from making further inquiries.

> "He had not observed, as I think he should have done in the circumstances, the number of cheques that were coming in and the size of them. . . . I do not think that he appreciated the significance of a number of indorsed cheques coming in one after the other, or also the significance that the payments out included substantial sums for cash. If he had, I think that he would have found J.'s story less convincing, for within less than a month Bainbridge had received from people who were presumably his customers cheques amounting to £2,000 or £3,000. Surely a man whose business was on that scale and was done in cheques might have been expected to have a bank account of his own?" [35]

Before J. began paying in to the bank cheques drawn in favour of "Modern Confections," he had paid in several where the cheques were drawn in favour of Bainbridge himself (both types of cheque were indorsed by Bainbridge alone). Devlin J. indicated that the number and size of these cheques drawn in favour of Bainbridge should have put the bank on inquiry and the inquiry should have included reference to Bainbridge. He dismissed the argument that inquiry of Bainbridge would not itself have unearthed the true position. He quoted Lord Wright to the effect that it is no answer to a charge under section 82 of neglecting a proper precaution that if it had been taken it might have been fruitless.[36] Devlin J. said [37]:

> ". . . if a bank manager fails to make inquiries which he should have made, there is at the very least a heavy burden upon him to show that such inquiries could not have led to any action which could have protected the interests of the true owner; and that burden the bank has, in my judgment, failed to discharge in this case."

The decision is bound to cause some disquiet in the minds of bankers. If there had not been any earlier cheques drawn in favour of Bainbridge and collected for J., would the bank have been negligent in not making any inquiry with regard to the first cheque on which "Modern Confections" were the payees, and J. was asking the bank to collect? Perhaps yes, at any rate, if it had not been for a small amount.[38] And had it been followed by one or

[34] [1955] 1 W.L.R. 822, 825.
[35] [1955] 1 W.L.R. 822, 826.
[36] In *Lloyds Bank, Ltd.* v. *Savory & Co.* [1933] A.C. 201, 233.
[37] [1955] 1 W.L.R. 822, 838.
[38] This is borne out by Sellers J.'s decision in *Nu-Stilo Footwear* v. *Lloyds Bank, Ltd.* [1956] C.L.Y. 676, where the plaintiffs employed M. as secretary. M. opened an account at the defendant bank in the name of B., giving himself,

more similar cheques, then a court might hold it was happening "quite regularly," and certainly the bank would be liable if it had not made proper inquiries; it is a matter of conjecture when the duty arises—after the second, third, or fourth third party cheque is presented for collection? And when is a cheque for only a "small amount"?

Obviously, the only safe course is for a bank invariably to inquire when a third party cheque is presented for collection, and if this is so when the payee is a firm or company, then it may be the wisest thing also where the payee is only an individual. Inquiry should be made by the bank of the payee, and it makes no difference that the inquiry might be futile. As far as the bank in *Baker* v. *Barclays Bank, Ltd.*[39] was concerned, Bainbridge was the sole partner of "Modern Confections" and nothing could reasonably have led them to think otherwise unless Bainbridge had himself told them, which is unlikely. But failure to make inquiry of Bainbridge as to J.'s rights to the cheques was negligence.

Contributory negligence

Nor can the bank defend itself by alleging that the owner (usually the payee) has shown lack of care or contributory negligence, or that the bank has been "lulled to sleep" by the owner's failure to detect the frauds that have been perpetrated. Such a defence had been allowed in *Morison* v. *London County and Westminster Bank, Ltd.*,[40] but the Court of Appeal in *Lloyds Bank, Ltd.* v. *Chartered Bank of India, Australia and China*,[41] refused to follow that case on the grounds that it was inconsistent with earlier decisions that, in order to act as an estoppel, the owner's negligence must be the proximate cause of the loss. Scrutton L.J. put the point in a homely form[42]:

> "If my butler for a year has been selling my vintage wines cheap to a small wine merchant, I do not understand how my negligence in not periodically checking my wine book will be an answer to my action against the wine merchant for conversion."

M., as referee and saying that B. was a free-lance agent. The bank telephoned M. who said B. was just starting in business and within a few years should do well. They also telephoned M.'s bank and were told that M. was a suitable person to give a reference. M. then passed 9 cheques through B.'s bank account, drawn on the plaintiffs' bank and either payable directly to B., or third party cheques. Sellers J. gave judgment in conversion for the plaintiffs in all but the first cheque. He said that, in view of the facts ascertained when the account was opened, the large sums which were inconsistent with B.'s commencing business as a free-lance agent, and the fact that some of the cheques were third party cheques, the bank was negligent in passing the later cheques through without inquiring. The first cheque was payable directly to B., but the second cheque was the first third party cheque paid in, and still the bank were liable in conversion for that.

39 [1955] 1 W.L.R. 822.
40 [1914] 3 K.B. 356.
41 [1929] 1 K.B. 40.
42 [1929] 1 K.B. 40, 60.

Mr. Megrah has urged that estoppel should be allowed to operate less rigidly, and that contributory negligence of the true owner might provide some defence.[43]

The heavy burden on collecting banks

Even before *Baker* v. *Barclays Bank, Ltd.*,[44] opinion was mounting that the standard of care required of a collecting bank was a very heavy one. Jacobs, in the fourth edition of his book on bills of exchange, published in 1943, took the view that "from the long succession of cases in which the question of his negligence has arisen, the collecting bank has received hard treatment at the hands of the courts."[45] Dr. Milnes Holden, writing in 1951, showed that the reports tell a sorry tale of losses of collecting banks in actions for conversion brought against them. In *Underwood's* case, they were £10,000, *Lloyds Bank, Ltd.* v. *Savory & Co.*, £6,012, on top of the heavy costs of such actions. Mr. Megrah, surveying "the decline and fall of section 82," after *Baker* v. *Barclays Bank, Ltd.*,[44] said[46]:

> "By successive interpretations of section 82 the banker is being forced into a position in which he cannot with impunity collect any third party cheque—which means that the essential principle of negotiable instruments legislation has been squeezed out. Here we see not only the decline but also the fall of section 82."

Certainly, a heavy burden is now imposed on a bank collecting a cheque drawn in favour of a third party. If, perhaps, it is an isolated transaction, the bank would not be held to be negligent if it had not made inquiry; and, if the customer were a solicitor seeking to pay such cheques into his clients' account, the bank is not required to inquire the solicitor's rights to the cheque. Generally, however, a third party cheque does call for inquiry, including inquiry of the payee. It is questionable whether the burden is impossibly heavy. One may reflect that Lord Bramwell used to say he was constantly told that banking could not go on if particular conditions and obligations were imposed on banks but he invariably found that banking did nevertheless go on and flourish.[47]

[43] Megrah, *op. cit.*, at p. 262. In the case of *Bute* v. *Barclays Bank, Ltd.* [1955] 1 Q.B. 202, warrants drawn by the Department of Agriculture for Scotland were made payable to "McGaw for the Marquess of Bute." McGaw had been a farm manager for the Marquess when applications were put in for sheep farming subsidies to the Department. When the warrants were issued, McGaw had left the Marquess's employment. McNair J. held the defendant bank were liable in collecting these warrants on behalf of McGaw's private account. As Mr. Megrah says, the whole fraud might have been avoided if the Marquess had informed the drawers of the warrants of the withdrawal of his agent's authority, and yet this aspect of the case was given no weight: *op. cit.*, p. 263.

[44] [1955] 1 W.L.R. 822.

[45] p. 248

[46] Megrah, *op. cit.*, p. 263.

[47] Quoted in *Paget on the Law of Banking*, pp. 294–295. One may mention in this context the fact that third party cheques do only account for about 3 per cent. of cheques presented to banks for collection.

Crossing "account payee"

This crossing on a cheque, which unlike the crossing "not negotiable," has no legislative sanction at all, has become increasingly popular because of the greater security it seems to offer to the true owner of a cheque. It is best to combine it with a "not negotiable" crossing, because where a cheque is only crossed "account payee," should the cheque be indorsed in blank and then stolen, a thief could negotiate it to a holder in due course[48] who could compel payment by the drawer; that would not be possible if it is crossed "not negotiable" as well as "account payee," because of the operation of section 81 of the Bills of Exchange Act.[49]

Undoubtedly, and it has long so been held, where a cheque is crossed "account payee" or "account payee only," the collecting bank is put on inquiry. It is under a duty to see that it collects for the payee or for someone who has the payee's authority. It must be certain that its customer is the payee named on the cheque or its customer has the payee's authority.[50]

The crossing does not restrict the negotiability of the cheque.[51] For example, if the payee is a young man without a banking account of his own, he could get his father, who has a bank account, to cash it for him, and assuming the bank were satisfied that the payee had given its customer (the father) authority to take the cheque, it would be protected. If the bank does not make such inquiry of the payee, it would be liable if it collected for someone other than the true owner. In *House Property Co.* v. *London County and Westminster Bank*,[52] a cheque was drawn in favour of "F. S. H. and others or bearer," and crossed "account payee." N., a solicitor, who was the bearer of the cheque, paid it into his own private account and the bank credited him with the amount without making inquiries as to his title. The court held the bank was negligent and liable to the owner. It had been argued that, as the cheque was a bearer cheque, the bank had collected for the account of the

[48] Defined below, note 56.

[49] "Where a person takes a crossed cheque which bears on it the words 'not negotiable,' he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had."

[50] If a cheque so crossed is drawn in favour of "A B & Co.," the collecting bank is under a duty to satisfy itself of the ownership of the business by asking to see the certificate issued under the Registration of Business Names Act, 1916 (see Holden, *op. cit.*, at pp. 42–43). Dr. Milnes Holden says that because of the heavy burden the crossing puts on collecting banks, it is not surprising that banks have never directly encouraged its use. Atkin L.J. in *Importers Co., Ltd.* v. *Westminster Bank, Ltd.* [1927] 2 K.B. 297, 309, said that the duty of the collecting bank with regard to "account payee" cheques was to see that they are collecting the money for the account of the payee and that the proceeds when received will go to the payee. Dr. Holden thinks this dictum probably places the duty too high. One may wonder whether under the law as it stands at present, the burden imposed on a collecting bank when this crossing is used is very much heavier than when it is not used.

[51] *National Bank* v. *Silke* [1891] 1 Q.B. 435.

[52] (1915) 86 L.J.K.B. 1846.

payee, who was the "bearer." Rowlatt J., however, said that this was a "shallow argument"—"'account payee' does not mean the account of the man who in the process of negotiation is the owner of the cheque at the time it is collected . . . 'payee' as written across the face of this cheque means the named payee on the cheque as drawn."[53]

The collecting bank as holder in due course

If, under the principles already discussed, a collecting bank is unable to claim the protection of section 4 of the Cheques Act, when sued by the true owner of the cheque, because it cannot show it has acted without negligence, it may still be protected if it is a holder for value[54] of the cheque, or, should there be a defect[55] on the cheque, it may be protected if it is a holder in due course of the cheque.[56] This protection applies irrespective of any negligence on the part of the collecting bank; it cannot be liable in conversion to anyone, because the bank itself is the true owner.[57]

It was already established before the Cheques Act that a collecting bank is something more than a mere agent for collection—is in fact a holder for value, in two main types of cases. First, a collecting bank is a holder for value where there is an express or implied agreement or understanding with the customer to apply the cheque in reduction of an overdraft,[58] or to allow him to draw against the cheque before the proceeds have been cleared, or if in fact, it gives cash for the cheque over the counter. The possibility was raised before the Court of Appeal in *A. L. Underwood, Ltd.* v. *Barclays Bank, Ltd.*,[59] that a collecting bank, simply of its own accord crediting the account of the customer with the amount of a cheque before it has been cleared, becomes a holder for value. In that case, Underwood had converted himself into a limited

[53] (1915) 86 L.J.K.B. 1846, 1847.

[54] A holder for value has complete rights on the cheque, unless there is a defect in his title. Valuable consideration is defined in s. 27 of the Bills of Exchange Act.

[55] For example, the signature of the drawer or an indorser has been obtained by fraud, misrepresentation, or undue influence, or for an illegal consideration.

[56] No defect in the title of any previous holder of a cheque will affect a holder in due course. By s. 29, a holder in due course is a holder who has taken the cheque, complete and regular on the face of it, under the following conditions; namely: (a) that he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact; (b) that he took the cheque in good faith and for value, and that at the time the cheque was negotiated to him he had no notice of any defect in the title of the person who negotiated it. By s. 29 (3), a holder (whether for value or not) who derives his title to a cheque through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards all parties to the cheque prior to that holder.

[57] Even if a thief of the cheque is prosecuted to conviction, cheques are excepted from the revesting provisions of s. 45 of the Larceny Act, 1915.

[58] For a South African case where a collecting bank was recently held to have been a holder for value of a cheque paid in, see *Volkskas Beperk* v. *Zagriorev*, [1958] C.L.Y. 238; 1958 (2) S.A. 550.

[59] [1924] 1 K.B. 799.

company; he held all the shares but one held by his wife. He paid into his own private account at the defendant bank cheques drawn in favour of the company and indorsed "A. L. Underwood, Ltd., A. L. Underwood, sole director." The defendant bank's main contention was that they took the cheques as holders for value as, immediately upon the cheques being paid in, the bank credited Underwood with the amounts, in the sense that they made a credit entry in their ledger to that effect. The Court of Appeal held that, as there had been no express or implied agreement between the bank and Underwood that he should be allowed to draw against these cheques before they were cleared, the bank was not a holder for value. The court felt it made no difference that the bank might, in its discretion, anticipate clearance in paying—there was nothing to prevent the bank from declining to honour a cheque, if the payment in against which it was drawn had not been cleared.[60]

If, however, there had been such an agreement, any action against the collecting bank in conversion would have failed, because the bank, as holder for value, would have a perfect right to the cheque. So too, if fortuitously there had been an agreement that cheques paid in would be applied [61] in reduction of an overdraft, and cheques were paid in to reduce that overdraft, no matter how negligent the bank might be held to be, it could have claimed to be holder for value and thereby protected.

Of course, in many cases where actions are brought against a collecting bank, there has been a forged or unauthorised indorsement,[62] and a collecting bank could not then claim to have any rights to the cheque as a holder in due course thereafter, since by section 24 of the Bills of Exchange Act, no right to retain a cheque can be acquired through or under a forged or unauthorised indorsement; a forged or unauthorised indorsement involves not just a defect, but a complete absence of title, and is not cured when it comes into the hands of someone who, otherwise, could claim to be a holder in due course. So also, if a cheque is crossed "not negotiable," a collecting bank could not claim to have any better right to a cheque than previous holders—if the title of any previous holder were defective, it would have no right to it.

[60] *Per* Scrutton L.J. at p. 804. A year earlier, in *Sutters* v. *Briggs* [1922] 1 A.C. 1, Lord Birkenhead L.C., *obiter*, seemed to say that a collecting bank merely crediting a customer in his own books with the amount of a cheque makes the collecting bank a holder for value. This is the view expressed in Paget's *Law of Banking* (p. 327). *Sutters* v. *Briggs* was not cited in *Underwood's* case, but in the latter case the Court of Appeal was concerned directly with this problem, and came out expressly and clearly with the judgment that a collecting bank does not become a holder for value merely by crediting a customer in his own books with the amount of a cheque.

[61] One might have thought that this was the usual arrangement.

[62] In *Underwood's* case, the indorsement was not unauthorised, as Underwood had a perfect right to indorse on behalf of the company. With bearer cheques, negotiation does not require indorsement, so that a thief of a bearer cheque can pass a good title to someone taking it in good faith, unless the cheque is crossed "not negotiable."

The claim of a collecting bank to be a holder in due course was made in *Baker* v. *Barclays Bank, Ltd.*[63] The full facts have been related earlier.[64] There was a defect on each cheque in the fraud of Bainbridge, and by section 30 (2) of the Bills of Exchange Act, the burden of proving value has been given rested, therefore, on the defendant bank. J.'s explanation that he was helping with the financial side of Bainbridge's business was inconsistent with his having given value for the cheques. Had the bank given value? There was no agreement by the bank to honour cheques drawn by J. before the proceeds of the cheques paid in had been received, and although J. did have an overdraft, the bank could not claim the cheques were intended to reduce this overdraft as the bank believed the cheques to be Bainbridge's money. Such was Devlin J.'s decision.

A third way in which a collecting bank can claim to be a holder for value is if it has a lien over the cheque. This would be so if the customer owed any debt or obligation to the bank. A bank has a general lien in such cases by implication of law. Section 27 (3) of the Bills of Exchange Act states that "where the holder of a bill has a lien on it . . . he is deemed to be a holder for value to the extent of the sum for which he has a lien." So, it would seem that if a customer is overdrawn, when he pays in a cheque, the bank is deemed to be a holder for value to the extent of the overdraft, whether there was any arrangement for so paying off the overdraft or not.

The only change made by the Cheques Act is one consequential on the abolition of the need for indorsement when a payee or indorsee of a cheque pays it into his own account. Section 2 reads:

> "A banker who gives value for, or has a lien on, a cheque payable to order which the holder delivers to him for collection without indorsing it, has such (if any) rights as he would have had if, upon delivery, the holder had indorsed it in blank."

If, therefore, on the law we have just discussed, a collecting bank is or is deemed to be a holder for value, it will be so despite the lack of an "essential" indorsement, namely, the indorsement of its own customer. The section does not refer to irregularly indorsed cheques, so that if the bank's customer irregularly indorses a cheque, the bank could not claim to be holder in due course, because the cheque would not be "complete and regular on the face of it," as required by section 29 of the Act to enable a holder to be a holder in due course.[65]

Gordon Borrie.*

[63] [1955] 1 W.L.R. 822.
[64] See p. 23, *ante*.
[65] This would not matter, if there was no defect on the bill, because then to have a good title, it is sufficient to be a holder for value: *Arab Bank, Ltd.* v. *Ross* [1952] 2 Q.B. 216.

* LL.M., Barrister-at-Law. Reader at the Law Society's School of Law.

FUNDAMENTAL PRINCIPLES OF SOVIET CRIMINAL LAW

I

Soviet criminal legislation consists of federal laws, which operate on the entire territory of the U.S.S.R., and the criminal codes of the constituent Union Republics. If they have not (or not yet) been incorporated in the penal codes of the Union Republics, federal laws are applied directly by the courts in the Republics. If they have been incorporated, they are applied by the courts on the ground of the corresponding provisions of the criminal code of the Union Republic on the territory of which the crime was committed. If a law of a Union Republic contradicts a federal law, the latter is the one which is applied.

There is now a rather considerable number of federal criminal laws. For example, responsibility for the embezzlement of state or public property, theft of personal property, robbery of personal property and for rape is stipulated in federal laws. These came into being during the period in the history of Soviet criminal legislation (1936–57) when the Constitution of the U.S.S.R. provided for the promulgation of a Criminal Code of the U.S.S.R. and, in consequence, the Union Republics passed few criminal laws.

In February 1957 the Supreme Soviet repealed that provision of the Constitution and placed within the jurisdiction of the U.S.S.R. the promulgation only of the most important criminal laws. The promulgation of criminal codes was placed within the jurisdiction of the Union Republics. This restored the situation that had existed prior to 1936, when only the Fundamental Principles of criminal legislation of the U.S.S.R. and the Union Republics (promulgated in 1924), and the statutes concerning crimes against the state and military offences (until recently the 1927 statutes were in force), came within the jurisdiction of the U.S.S.R. in the sphere of criminal legislation.

These laws were amended many times during the more than thirty years since their promulgation. It became increasingly obvious, however, that the social changes which had taken place in the country in this period necessitated a more thorough revision. This has been done in the new Fundamentals of Criminal Legislation [1] and the laws about responsibility for crimes against the state

[1] The expression used in the law of December 1958 to indicate the basic principles of the criminal law is translated in this article by the word "fundamentals," in contrast with the differing expression used in the law of 1924 which is here translated "fundamental principles." There does not appear to be any difference in meaning between the two expressions, and their use without this explanation might be puzzling to the reader.—Ed.

and military offences adopted by the U.S.S.R. Supreme Soviet on December 25, 1958.

The place of the Fundamentals in the system of Soviet criminal legislation is determined by the fact that, as stated in Article 2, they establish the principles and formulate the general provisions of the criminal law of the U.S.S.R. and the Union Republics. All Soviet criminal law is based on these principles and general provisions; in particular, the criminal codes of the Union Republics, on the drafts of which intensive work is now in progress.

The new Fundamentals preserve those provisions of Soviet criminal law which have proven their worth in practice. Many of them were formulated in legislation earlier in operation, while others took shape in the course of judicial practice and have now been made law. On the other hand, rules that either partly or wholly failed to measure up to the demands of the present period are either not in the Fundamentals at all or have been revised in one form or another. Some of them were called into being by conditions that were specific at a certain stage of the country's development and now no longer exist.

II

The Fundamentals consist of four sections:

I. General Provisions; II. Crime; III. Punishment; IV. The Assignment of Punishment and Release from Punishment.

Section I deals with the operation of the law in space (Arts. 4 and 5) and in time (Art. 6). The first problem is treated on the basis of the territorial and personal principles: a person who commits an offence on the territory of the U.S.S.R. is liable under the penal laws operating in the place where the offence was committed; the criminal responsibility of persons enjoying the right of extra-territoriality is a matter decided through diplomatic channels; citizens of the U.S.S.R. who commit an offence abroad are criminally responsible under the laws of the Union Republic on the territory of which criminal proceedings have been instituted against them or they have been put on trial. In this respect the previous legislation remains unchanged, with the exception of the fact that, according to Article 5, for crimes committed outside the territory of the U.S.S.R., foreigners are responsible under Soviet criminal laws in cases stipulated in international agreements.

The second problem (that of time) is treated in conformity with the principle of non-recognition of the retroactive force of a more severe law. The former legislation did not recognise it either but allowed the possibility of exceptions which had to be stipulated in a new and more severe law: now this possibility is excluded altogether. Like the legislation in force earlier, the Fundamentals specify the retroactive precedence of a more lenient law.

Article 2, which I have already mentioned, consolidates the above-described structure of Soviet penal legislation. In conformity with this Article, it consists of the Fundamentals, federal laws fixing responsibility for certain offences and the penal codes of the Union Republics. The federal criminal laws define the responsibility for crimes against the state and military offences, and, in necessary cases, also for other crimes against the interests of the U.S.S.R. Since " crimes against the interests of the U.S.S.R. " are chiefly instances of crimes against the state, we may conclude that the above-mentioned " necessary cases " will be rare exceptions to the rule.

Defining the purposes of Soviet criminal legislation, Article 1 points out that it is called upon to protect the Soviet social and state system, socialist property, the person and rights of citizens and the whole of socialist law and order against criminal encroachments. The main difference between this definition and the former one (in the preamble of the Fundamental Principles of 1924) is the inclusion of the reference to the person and rights of citizens.

III

Of major importance among the General Provisions of the Fundamentals, in my opinion, are those formulated in Article 3, entitled " Grounds for Criminal Responsibility ": " criminal responsibility and punishment apply only to a person guilty of the commission of a crime, that is, who with intent or through carelessness has committed a socially dangerous act stipulated by the criminal law. Criminal punishment is imposed only by sentence of a court."

To elucidate the importance of these provisions one must examine them in historical and theoretical perspective.

The first Soviet penal code, the Criminal Code of the Russian Federation, adopted in 1922, stated in Article 5 that its purpose was the judicial defence of the state against crime and against socially dangerous elements by imposing punishment or taking other measures of social defence. From certain other provisions of the code we can see that it made a distinction between punishment and " other measures of social defence " on the ground that punishment was imposed in connection with the commission of an offence, while measures of social defence were taken in connection with " activity testifying to a grave threat to public law and order " (Art. 7). The 1924 Fundamental Principles completely rejected the term " punishment " and spoke only of social defence measures. However, many provisions of the Fundamental Principles illustrate that within the framework of this concept it distinguished measures that were applied only in connection with intentional or careless acts (Art. 6) and were commensurable with the degree of danger not only of the criminal but also of the offence he committed. This, as we know, is not characteristic of social defence measures which

have no bearing on guilt and which are applied by a court "with regard to persons found to be socially dangerous because of their criminal activity or associations with the criminal environment in the given locality" (Art. 22) regardless of whether they have committed a "definite offence."

The situation in this respect remained not altogether clear until the Judiciary Act of 1938 established that the commission of a crime constituted grounds for the institution of criminal proceedings and that the reaction of the state thereto could only be punishment. The 1938 Act made no mention either of social defence measures or of the social danger of a person as grounds for applying these measures. And although the 1938 Act had not been promulgated to repeal the Fundamental Principles of 1924, it nevertheless gave the Supreme Court of the U.S.S.R. cause to indicate to courts in 1946 that in keeping with the spirit of Soviet penal legislation punishment could be imposed by courts only in cases where a definite crime had been committed. Thus, legislation and court practice after 1924 did not take the path of applying social defence measures.

The significance of Article 3 of the new Fundamentals is primarily determined by the fact that it consolidates this provision in law. In conformity with Article 3, *guilt* of having committed a *crime* constitutes grounds for criminal responsibility, and the reaction of the state thereto can be (although it need not necessarily be, about which I shall speak below) only punishment, *i.e.*, a measure of compulsion by the state which, according to Article 20, is not only retribution for the crime committed but is also aimed at reforming and re-educating the convict.

The significance of Article 3 is determined, further, by the fact that it does away, for the first time in the history of Soviet legislation, with the application of criminal law by analogy. Both the 1922 Criminal Code of the Russian Federation and the 1924 Fundamental Principles stipulated that if a socially dangerous act was not *expressly* provided for by statute, a person who committed it could be punished "by analogy with those articles of the penal codes which deal with crimes most similar in gravity and nature" (Art. 3 of the Fundamental Principles). In other words, the 1924 Fundamental Principles regarded as a criminal offence a socially dangerous act envisaged by the law expressly or in a general way. This understanding of a criminal offence placed definite limitations on the application of the criminal law by analogy. We know that during approximately the last fifteen years the law on analogy was hardly ever applied in practice. Still, theoretically and practically the possibility of imposing punishment for an act not expressly provided for by the law continued to exist. The new Fundamentals do not contain any provisions on this score similar to those in Article 3 of the 1924 Fundamental Principles. Furthermore, as we have seen, they define a criminal offence as a socially dangerous act expressly *provided for by the criminal law.*

IV

The provision of Article 3 that criminal punishment may be imposed only by sentence of a court also consolidates a principle which took firm root in practice following the abolition of the Special Tribunal. In the context of the new document, however, it is of interest from another aspect as well, as an expression of the policy of enhancing the role of the court in imposing punishment. A number of provisions in the new Fundamentals bear witness to this.

Article 46 establishes that apart from instances of release from, or mitigation of, punishment by amnesty or pardon (which is a prerogative of the supreme authorities) the release of a convict from serving his sentence or the mitigation of his penalty may be effected only by a court, in cases, and according to the procedure, fixed by law. This provision is particularly important with regard to release on parole, an institution with an interesting history.

Parole was provided for in the 1924 Fundamental Principles, and up until 1927 it could be applied regardless of what part of his sentence a convict had served. In 1927 it was established that a convict could be released on parole after having served not less than two-thirds of his sentence. In the thirties the institution of release on parole by decision of a court was abolished; in place of the court, the question of release before the expiration of the term was decided by the administration of the place of detention. In 1954 the procedure of granting parole by decision of a court was restored; parole could be granted if the convict had served not less than two-thirds of his sentence. This procedure existed side by side with that of early release by decision of the administration of the place of detention, and in the competition between these two methods the court procedure did not always gain the upper hand.

Now the administrative procedure has been done away with altogether. Release on parole from deprivation of liberty,[2] corrective labour without deprivation of liberty, exile or deportation is decided only by the courts (Art. 44 of the Fundamentals). If a convict who has served not less than half of his sentence has shown, by good conduct and a conscientious attitude towards work, that he has reformed, the court may release him on parole or commute the unserved part of the term to a milder penalty. A person convicted for particularly dangerous crimes against the state, or other grave offences, an enumeration of which will be established in the criminal codes of the Union Republics, has to serve not less than two-thirds of his sentence before parole may be applied for.

Under Article 43 of the Fundamentals a court may free from punishment a person who has committed a crime if it finds that in view of his subsequent impeccable conduct and a conscientious attitude towards work he cannot be considered as socially dangerous

[2] The expression "deprivation of liberty" is wider than "imprisonment" in the strict sense.—Ed.

by the time the trial takes place. The investigation agencies are also empowered to release a person from responsibility if by the time of the investigation or the trial, respectively, changes in the situation have deprived the act he committed of its socially dangerous nature. This principle existed in the previous legislation, but then it was a matter of a change "in the social and political situation" (Art. 8 of the Criminal Code of the Russian Federation), which is obviously a much narrower term than the one employed in Article 43 of the new Fundamentals.

Speaking about the policy of enhancing the role of the courts, I should also like to note the fact that the new Fundamentals place within the jurisdiction of the courts certain questions which formerly were regarded as being purely disciplinary and as such were decided by the administration of the place of detention. In enumerating the penalties in Article 21 the Fundamentals speak of deprivation of liberty, and in Article 23 they establish that adults sentenced to deprivation of liberty serve their term in a corrective labour colony or in a prison. The law thus regards confinement in a prison or in a corrective labour colony as forms of one and the same punishment. Nevertheless, the Fundamentals withdraw from the administrative agencies the power to replace one form of the punishment by another, and transfer it to the courts. Specifically, persons who have served not less than half their term of prison confinement [3] may, by decision of a court, be transferred to a corrective labour colony if their conduct has been good. Conversely, if a person confined in a corrective labour colony maliciously infringes the rules of the colony, the court may order his transfer to prison confinement for a period, not exceeding three years of the unexpired portion of the sentence, if any, to be served in a colony (Art. 23).

V

Certain changes—which are specified below or indicated by the italicised words—have been made in Section II, "Crime."

In conformity with Article 3, about which I have spoken above, Article 7 defines a criminal offence as a socially dangerous act or omission, *provided for by criminal statute*, which encroaches on the Soviet social or state system, the *person*, *the political*, *labour*, *property or other rights of citizens*, as well as any other socially dangerous act, *provided for by criminal statute*, which encroaches on socialist law and order. Articles 8 and 9 give a definition of intent (direct or indirect) and of carelessness (recklessness or negligence), the concepts referred to in Article 3.

[3] It should be noted that deprivation of liberty in the form of confinement in a prison for the entire term of punishment, or for part of it, may be imposed by a court on persons who have committed grave offences and also on particularly dangerous recidivists.

Article 11 establishes that punishment shall not be imposed on a person who commits a crime while in a state of insanity or who has become insane by the time of the pronouncement of judgment by the court. A person who commits a criminal offence while in a state of drunkenness is not freed from criminal responsibility (Art. 12). Articles 13 and 14 define necessary defence [4] and extreme necessity as circumstances removing criminal responsibility.

Punishment for the preparation of and attempt to commit a crime, as established in Article 15,[5] is imposed under the law which stipulates responsibility for the given crime, with account taken of the nature and degree of the social danger of the acts committed, the degree to which the criminal intent was carried out, and the causes by virtue of which the crime was not carried to completion. It should be noted that, in practice, preparation for a crime entails responsibility only in exceptionally rare cases, and the provision concerning the punishability of preparatory actions has been retained in the law chiefly owing to the difficulties, known to criminal lawyers throughout the world, connected with the laying down of an abstract definition of the beginning of an attempt at a crime. Article 16 provides that a person who does not, of his own will, carry an offence to completion shall be freed from criminal responsibility.

Article 17 contains a definition of complicity (as the intentional joint participation of two or more persons in the commission of a crime) and accomplices—principals, organisers, inciters and abettors. As distinct from the majority of the operating criminal codes of the Union Republics, which classify any concealment as aiding, the Fundamentals regard only concealment promised beforehand as complicity in the form of aiding. As for concealment not promised beforehand, according to Article 18, it entails criminal responsibility only in cases especially stipulated by the criminal law. Article 19 contains an analogous rule concerning failure to report crime known to be in preparation or to have been committed.

VI

The new law introduces a number of substantial changes in the provisions concerning punishment.

First of all, the definition of punishment itself is somewhat different from that in the 1924 Fundamental Principles but the

[4] It should be pointed out, moreover, that *obvious inconformity of the protective measures with the nature and danger of the assault constitutes an excess of the limits of necessary defence.* Necessary defence is a concept wider than that of self-defence in England.—Ed.

[5] A definition of both concepts is given in that Article. The definition of an attempt to commit a crime—an intentional act expressly directed at the commission of a crime if completion of the offence is frustrated by something other than the will of the guilty person—was not, incidentally, contained in the law before.

same as in the Judiciary Act of 1938. The purposes of punishment as before, are to reform and re-educate those who have been convicted and to prevent the commission of fresh crimes either by those convicted or by any other persons. As before, retribution is not recognised as the *purpose* of punishment. However, when the 1924 Fundamental Principles mentioned retribution they limited themselves to that point. Possibly this was because no attempt was made in the 1924 document to define the *substance* of punishment. Perhaps the reason was also partly because the idea of retribution as deprivation of the criminal of definite benefits in proportion to the gravity of his offence—an idea inseparably bound up with the very concept of responsibility and recognition of the ability of a person to make a choice between right and wrong—was alien to the concept of "measures of social defence." Article 20 of the new law establishes that punishment is not only retribution for the crime committed but has the purpose of reformation, re-education and prevention as already indicated. The Article emphasises that punishment does not have the purpose of inflicting physical suffering on the convicted person or degrading his human dignity.

The list of penalties was also changed. As before, it contains deprivation of liberty, exile and deportation, corrective labour without deprivation of liberty, deprivation of the right to hold certain positions or engage in certain activity, confiscation of property, and pecuniary fines. Omitted from the law, however, is the declaration of a criminal to be an enemy of the working people, with all its consequences, and disfranchisement; the abolition of disfranchisement means, in the first place, the abolition of such a penalty as deprivation of electoral rights.

Before going over to a more detailed examination of certain forms of punishment from the point of view of substance it is necessary, in comparing the former legislation with the new Fundamentals, to dwell on the death penalty. As before, the death penalty does not figure in the general enumeration of punishments. This is explained by the fact that, as stated in Article 22, until its complete abolition the death penalty is allowed as an exceptional measure. As distinct from the previous law, it is not imposed in cases of wrecking. It will be imposed for premeditated murder only where such aggravating circumstances are present as are *specified in the articles of the criminal laws which establish responsibility for this crime.* It is worthy of note that for the first time in the annals of Soviet criminal legislation the Fundamentals *themselves* list the offences for which the death penalty may be imposed as follows: treason, espionage, sabotage, terrorist acts, banditry, and murder with aggravating circumstances (to be specified in republican criminal codes), in time of war or condition of hostilities. This constitutes a complete list for the legislative bodies of the constituent Union Republics. As before, the death penalty cannot

be applied to persons who have not reached the age of eighteen (the age of majority in the U.S.S.R.) at the time of the commission of the crime. Moreover, under the new Fundamentals it cannot be imposed on women who were pregnant at the time of the commission of the crime or at the time judgment is passed.

As for deprivation of liberty, I have already dwelt, in another connection, on a number of the provisions in the Fundamentals on this question. I did not, however, have an opportunity to indicate another important aspect, namely, the sharp reduction in the maximum term of this penalty. Under legislation previously in force, deprivation of liberty could, in a number of cases, be imposed for a term of up to twenty, or even twenty-five years. The point, however, is not only this but the fact that such long terms of deprivation of liberty were provided not only for crimes against the state, which are hardly ever met with in practice, but also for such relatively common offences as encroachments on property—embezzlement of state and public property and robbery—and crimes against the person. Under Article 23 of the new Fundamentals, deprivation of liberty may be imposed for a term not exceeding ten years. Only for particularly grave crimes and on especially dangerous recidivists, in cases stipulated by the legislation of the U.S.S.R. and the Union Republics, may a longer term be imposed, but not exceeding fifteen years.

The maximum term of exile [6] has also been considerably lowered. Formerly it was fixed by law at from three to ten years, but under Article 24 of the new Fundamentals the maximum term is five years. Moreover, sentences of exile or deportation cannot be applied to persons under eighteen at the time of the commission of the crime. Pregnant women or women who have children under eight dependent on them may not be sentenced to exile.

Some changes have been made in the provisions relating to corrective labour without deprivation of liberty. Persons to whom this penalty is applied not only remain at liberty but usually continue to work at the place where they were employed before the sentence was passed. However, the period during which they serve the sentence is not counted as part of their record of employment entitling them to a pension, privileges or other benefits. Moreover, a percentage of the offender's earnings passes over to the state during the term he serves his sentence. Under the criminal code of the Russian Federation this could be as much as 25 per cent., but the Fundamentals reduce the maximum to 20 per cent. In itself, this is a small change, but it should be borne in mind that sentences

[6] Art. 24: there are two forms: exile and deportation. The first entails removal of the convicted person from his ordinary place of residence with compulsory settlement in a prescribed locality; the second entails removal from place of ordinary residence and prohibition from living in prescribed localities. The final paragraph of this article reads: "The procedure, localities and conditions for serving exile, and the procedure and conditions for banishment, are established by legislation of the U.S.S.R. and constituent Republics."

of corrective labour without deprivation of liberty constitute more than half the total number of sentences imposed in criminal cases.

Article 30 of the Fundamentals substantially reduces the sphere of application of the penalty of confiscation of property. Hitherto it was applied only as a supplementary punishment and, as distinct from other supplementary punishments, only in cases specified by law. Now Article 30 has introduced a new restriction: confiscation of property may be provided for by law only in cases of crimes against the state or grave offences committed for purposes of material gain. In practice this will mean a considerable narrowing of the application of this form of punishment.

Alongside this policy of reducing terms of punishment, the Fundamentals pursue a strict policy against certain categories of criminals. I have already mentioned that the law permits sentences of deprivation of liberty of up to fifteen years in the case of persons guilty of particularly grave crimes and also in the case of especially dangerous recidivists [7]; also that in these cases the entire sentence of deprivation of liberty, or part of it, may take the form of confinement in a prison; finally, that in the case of persons found guilty of especially grave crimes against the state or other grave crimes the law establishes a longer minimum term of serving the sentence before release on parole may be applied for. I may add that release on parole or substitution of part of the term of punishment by a milder penalty is not applied, at all, to particularly dangerous recidivists (Art. 44).

VII

A special place in the new law is occupied by Article 47, which deals with the lifting of the legal consequences of serving a sentence (which in Russian is called *sudimost*)—the right to hold the elected office of People's Judge, to hold certain posts connected with pecuniary responsibility, etc.—which follow as a result of having served a term of criminal punishment. Under the legislation in force before, the consequences were lifted automatically on the expiration of a definite period after the serving of the sentence only if the offender had been sentenced to deprivation of liberty for a term not exceeding three years. If the term was longer, *sudimost* was not lifted automatically but only by an act of amnesty or a pardon. And although amnesty laws were promulgated fairly frequently, they naturally did not refer to all offenders and therefore, in theory, a person who had served a term could, in some cases, remain in a state of *sudimost* for the rest of his life.

Article 47 of the 1958 Fundamentals establishes a new procedure in this sphere: automatic lifting of the consequences in all cases upon the expiration of a definite period after the sentence has

[7] The requirements for such a finding are to be laid down in the codes of the constituent Republics.

been served, on condition that during that period, which varies according to the nature of the penalty, the person does not commit an offence. This period is fixed at three years for persons sentenced to deprivation of liberty for a term not exceeding three years; at five years for a sentence of from three to six years; at eight years where the sentence is from six to ten years. The only exception to this procedure is made in the case of persons sentenced to deprivation of liberty for a term exceeding ten years. *Sudimost* may be lifted from such persons by a court if during the course of eight years after having served their term they do not commit an offence and if the court is satisfied that they have reformed and there is no need to retain the *sudimost*. To this it should be added that if after having served a term of deprivation of liberty a person demonstrates, by his good conduct, and a conscientious attitude towards work, that he has reformed, a court may, on the application of social organisations,[8] lift the consequences before the expiration of the above-mentioned periods.

VIII

The last question I should like to touch upon in this review is the criminal responsibility of minors.

Under the legislation hitherto in force, criminal responsibility for certain offences—accompanied by violence against the person and theft—could attach if the offender had reached the age of twelve at the time the crime was committed, and in all other cases at the age of fourteen. Article 10 of the Fundamentals raises each of these limits by two years. It states that responsibility for certain crimes, mainly those just mentioned, plus malicious hooliganism and specified cases of intentional damage to property, attaches at the age of fourteen, while for all other crimes the age is sixteen. Moreover, should the court find that a person under eighteen who has committed an offence which does not constitute a serious social danger could be reformed without applying the penalty provided by the law, it may apply to such a person measures of a compulsory educative character that are not criminal punishment. For example (from the Criminal Code of the Uzbek Republic, adopted in May 1959), turning over the minor to supervision by his parents, guardians or other relatives or by an agency of public education or a public organisation at his place of employment, or placing him in a children's labour educational establishment.

A person under eighteen at the time of commission of a crime cannot be sentenced to deprivation of liberty for a term of more than ten years. Moreover, he serves the term not in a corrective labour colony but in an establishment of a special type, a labour

[8] Such as a trade union, a collective farm, and even more loosely associated groups of people, such as all those working in a particular office, factory or shop.

colony for minors. Under all conditions the fact that an offender has not reached his majority is regarded as an extenuating circumstance (Art. 33). Finally (Art. 45), where a person sentenced to deprivation of liberty or corrective labour for a crime committed before he reached the age of eighteen demonstrates, by good conduct and a conscientious attitude towards work and instruction, that he has reformed, the court may release him from his penalty ahead of time, after he has served not less than one-third of it. Furthermore if the release is given before the person reaches the age of eighteen, it is absolute, *i.e.*, if he commits another offence before the expiration of the unserved part of his term, the unserved part cannot be added, either partly or in whole, to the penalty imposed for the new offence.

Boris S. Nikiforov.*

* LL.D.; head of the Criminal Law Sector of the Institute of Juridical Sciences of the U.S.S.R.: author of a number of works on Soviet and other criminal law, and editor of the Russian translation of Kenny's *Outline of Criminal Law*: author of a monograph on the criminal law of India.

SODOMY AS A GROUND FOR DIVORCE

THE Court of Appeal in *Bampton* v. *Bampton* [1] has granted leave to appeal to the House of Lords and so opened the way to the first "summit" consideration of the decision in *Statham* v. *Statham* [2] in its thirty years of existence. The appeal will test the validity of the holding that consent to an act of sodomy, or later condonation of the act, bars relief on that ground in a suit for divorce. It is the purpose of this note to speculate about the possible outcome of the appeal and to discuss some of the factual and policy conflicts which will confront the House of Lords.

The marriage in question in *Bampton* took place in 1953, when the husband was twenty-five and the wife nineteen. Ordinary marital relations continued for some two years and then the husband first attempted to commit sodomy on his wife in April 1955. She was then pregnant with their first child, which was in fact born in June 1955.[3] The first attempt was unsuccessful because of the wife's resistance but the husband persisted in his efforts six or seven times in the course of the next two years and was successful on about five occasions. "Normal" sexual intercourse and sundry other varieties of sexual experimentation also took place during this period. The wife gave birth to two children, on each occasion with great difficulty and, to avoid the danger of further pregnancy, she was sterilised in 1957. At the time of her petition for divorce, husband and wife had separated, apparently as a result of the husband's clandestine associations with other women and his increasing coolness towards the wife. After his callous insistence on sexual intercourse immediately after she had had an operation and his deceitfulness about his relations with another woman, she finally would have nothing more to do with him.[4] Barnard J. got the impression that she did not want to end the marriage at all,[5] despite the fact that it was she who petitioned for divorce on the ground that the husband had committed sodomy on her. Both at first instance and in the Court of Appeal, her petition was denied, leaving her with the possibility of success in the House of Lords, or the expense of further proceedings based on matters not investigated by the lower courts.[6]

1 [1959] 2 All E.R. 766.
2 [1929] P. 131.
3 The fact that regular sexual relations might have been difficult or obstetrically undesirable at this stage of the wife's pregnancy may well be significant in the husband's wish for sodomical intercourse at this time. His continuation of the acts once the temporary emergency had passed, however, means that he could not rely on this fact as affecting the overall issue.
4 [1959] 2 All E.R. at 767 F.
5 *Ibid.* 767 G.
6 *Ibid.* 771 F–H.

First, the question of whether the " sodomy " of section 1 (1) of the Matrimonial Causes Act should be interpreted as relating only to the sodomy of the husband with a third party, or also to sodomy with his wife. The difference is not entirely of academic interest. If it falls within the statute, then proof of the act of sodomy (excluding considerations of connivance, condonation or collusion) will satisfy the " ground " for divorce. Nothing in the way of deterioration in the wife's health need be shown. If, on the other hand, it does *not* come within the interpretation of the word in the statute, then it will only afford relief as a species of cruelty, for which proof of mental or physical harm is necessary. Sodomy first made its appearance in the Act of 1857 as a ground available to the wife.[7] In all probability, the legislators did not think of it as referring to the behaviour of husband and wife at all, for it was sandwiched in the statute between " rape " and " bestiality." The one did not at that time have any relevance to the relationship of husband and wife; the other, by its very nature, did not and cannot.[8] But in time, just as it has been accepted that a husband can in certain circumstances " rape " his wife,[9] so too the reference to sodomy has been read as referring *inter alia* to acts between husband and wife.[10] The trend, then, has been towards widening the interpretation of the section to allow more broken marriages to fall within it than a strict construction would allow. In *Bampton*, as in many other cases, the choice of the ground for the petition is not particularly significant in explaining the marriage failure. The wife had broken off relations with her husband and, unable to show any

[7] 20 & 21 Vict. c. 85, s. 27. Hodson L.J. is wrong in suggesting ([1959] 2 All E.R. at 769 B–C) that it had to be coupled with the husband's adultery. It is clear from the section that rape, sodomy and bestiality *by themselves* were enough to give a cause of action and this is emphasised by the Parliamentary debates. Incest, bigamy, cruelty and desertion had to be coupled with adultery to make it sufficiently serious—but rape, sodomy and bestiality were considered aggravated forms of " adultery " by themselves (see especially the Committee debates on clause 25 in the Commons: 147 Parl.Deb. 1267–1283, 1534–1565, 1569–1605, 1625–1644, 1891–1893, 2085–2088). That this was the intention is perhaps supported by the fact that it was suggested in both Houses that it would be clearer to leave out the particular words and refer only to adultery aggravated *in any way* (see Mr. Lygon, *ibid.*, 1597–1601; Bishop of Oxford, *ibid.*, 2045–2046). And, of course, this in turn supports the proposition that the words of the section contemplated only conduct of the husband with a third party. There is only one isolated reference to the fact that the word " rape " would cover the case of a husband who was a party to the rape of his own wife (Lord Redesdale, *ibid.*, 2045).

[8] Unless, perhaps, circumstances such as those in *R.* v. *Bourne* (1952) 36 Cr.App.R. 125, might lead to a court's straining the interpretation of " bestiality " for divorce purposes. There, a husband was convicted of aiding and abetting his wife to commit bestiality on a dog. The evidence showed that the husband had, on each occasion charged, sexually excited the animal and then compelled his wife to submit to " intercourse " with it.

[9] *e.g.*, *R.* v. *Clarke* (1949) 33 Cr.App.R. 216; *R.* v. *Miller* [1954] 2 Q.B. 282; [1954] 2 All E.R. 529.

[10] *e.g.*, *C.* v. *C.* (1905) 22 T.L.R. 26; *Statham* v. *Statham*, *supra*; *D. B.* v. *W. B.* [1935] P. 80. There was, of course, all the more need for such an interpretation before 1937 because, even if the sodomy amounted to cruelty, there was no independent ground of cruelty as a divorce cause.

nervous or physical distress which she could attribute to cruelty, or to produce actual evidence of his infidelity, she had to resort to the only remaining ground which she could hope to establish. The marriage was at a low ebb; to adopt this "ground" fitted the pattern of its previous use—although this is a suggestion the courts would hardly be prepared to admit.

But whether or not section 1 (1) does in fact encompass sodomy of the sort in issue here, another hurdle of statutory construction—that raised by *Statham*—still stands and, until the House of Lords decides otherwise, will continue to stand. Briefly, *Statham* held that the bars of connivance (consent) and condonation applied to defeat a petition on the ground of the husband's sodomy, even though section 4 of the 1950 Act [11] did not apply these specific bars to this specific "ground." Hodson L.J. in *Bampton* pointed out that "no words which carry the necessity of showing absence of consent appear in the statute" [12] but felt that he ought to import them there because of the decision in *Statham*. Sellers L.J.[13] and Harman L.J.[14] agreed, although the latter was noticeably unenthusiastic. If, however, the whole point is to be reviewed in the House of Lords, it can be approached with an open mind and free from the binding encumbrance of previous Court of Appeal decisions.

At the outset, it is obvious that the "canons" of statutory construction are not going to compel a decision one way or the other. There is no very forceful reason for deciding conclusively that the bars of connivance and condonation apply to all matrimonial problems implicitly; nor, on the other hand, that they only apply to adultery and cruelty, which are the "offences" mentioned in section 4. Golden rule, literal rule and mischief rule chase each other round the merry-go-round. To stop the machinery and strike out in a new direction will therefore need a clearly defined policy approach. A decision of the House of Lords—whose pronouncements are far from frequent in the field of domestic relations—will set the tempo of judicial thinking for several years to come. A survey of the issues involved shows at least three questions which the House must encounter: Are consensual acts of sodomy between husband and wife objectionable? Should these acts by themselves be enough to justify dissolving a marriage? Will it be possible to distinguish sufficiently between consensual and non-consensual acts to give this "offence" some operational meaning?

[11] Then s. 178 of the Judicature Act, 1925. Subs. (2) provides that "if the court is satisfied on the evidence that—(*a*) . . . and (*b*) where the ground of the petition is adultery, the petitioner has not in any manner been accessory to, or connived at, or condoned, the adultery, or where the ground of the petition is cruelty, the petitioner has not in any manner condoned the cruelty; and (*c*) . . . , the court shall pronounce a decree of divorce, but if the court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition."

[12] [1959] 2 All E.R. at 770 H.

[13] *Ibid.* 771–772.

[14] *Ibid.* 772 D–G.

Rape, sodomy and bestiality are all still criminal offences. Rape is surrounded by an air of undesirability because of the force or fraud implicit in the idea. Moreover, whether punishment is or is not the most effective and satisfactory way of dealing with *all* rapists, most of them are still punished. Similarly, bestiality is still a "live" offence and punishment and stigma will attend the convicted offender. But sodomy is a different matter altogether. Although it may have been regarded as gross perversion in 1857, it has undergone certain changes in respectability since then. If nothing else, it is medically and popularly known that the many and varied types of homosexuality are not all necessarily the result of conscious and deliberate choice. Modern distinctions tend to be in terms of the age of the "subject," the privacy or otherwise of the conduct and the psychological condition of the offender. In fact, the Wolfenden Committee felt sure enough of the overall change in public opinion to recommend that acts of sodomy between consenting adults in private should no longer be a criminal offence.[15] Certainly, the recommendation was directed more towards adult males than towards mixed company but, "privacy" being one of the fundamentals of the recommendation, it should apply all the more strongly to the sanctity of the bedroom of a husband and wife.[16] It is possible, of course, that the House of Lords may try to avoid the emotional implications of sodomy and simply make the morally neutral statement that consent to a "crime" does not excuse it.[17] Remembering, though, that judicial reaction towards sexual experimentation is frequently measured by the degree of moral revulsion felt by the judge,[18] one can perhaps only ask that

[15] Although the Home Secretary then announced that *he* did not consider public opinion sufficiently advanced to justify the reform of the law: 596 H.C.Deb. 370–371 (November 26, 1958). The public debate has now continued for several years. There is no general agreement either at Westminster or in the country whether or not homosexual behaviour is so abhorrent that the law is justified in interfering with individual privacy and choice. Public opinion polls taken two years ago showed that a slight majority opposed the Committee's recommendations (quoted by Mr. H. Montgomery Hyde, 596 H.C.Deb. 395). More recently, Mr. Justice Devlin has put forward the essentially Kantian proposal that the intrinsic immorality of behaviour should decide the law's attitude towards it (*The Enforcement of Morals*, 1959)—but he has been answered in plain terms to the effect that moral intolerance "is no adequate substitute for a reasoned estimate of the damage to the fabric of society likely to ensue if [the conduct] is not suppressed." (Hart, "Immorality and Treason," 62 *The Listener* 162 (1959).)

[16] Unless one can agree with Fortescue C.J. in *R.* v. *Wiseman* (1717) Fort. (K.B.) 91, that sodomy between husband and wife is "the greater offence, because it has greater aggravations, as there is no temptation nor solicitation from nature, and a woman to hand."

[17] Citing, perhaps, *R.* v. *Donovan* [1934] 2 K.B. 498; *R.* v. *Coney* (1882) 8 Q.B.D. 534 and *Bravery* v. *Bravery* [1954] 3 All E.R. 59.

[18] *e.g.*, Cresswell J.O. in *N.* v. *N.* (1862) 3 Sw. & Tr. 234, 236—"some questions of a very disagreeable nature, and I could well have wished to be relieved from the necessity of discussing them" (sodomy).

Merriman P. in *D. B.* v. *W. B.* [1935] P. 80, 82—"the most filthy sexual practices in connection with her" (sodomy).

Greer L.J. in *Statham* [1929] P. at 145–146—"She must have known that

the House of Lords will consider the questions of morality involved —and not be too shocked by the sodomy and *fellatio* involved in *Bampton* to be blinded to rational decision.

Being shocked or failing to be shocked by them, however, does not put an end to the matter. There then arises the more formidable philosophical question of whether the House of Lords should continue to favour the doctrine of the matrimonial "offence" over that which asks for some more complete evidence of marriage failure. At present, the mere doing of acts may amount to an "offence" which in turn may be the formal reason for dissolving a marriage. Certainly, recent years have shown us that some members of the judiciary [19] are intellectually committed to accepting this view as the only one valid in its context. Nonetheless, the relevant statutes have always allowed even the exponents of such a strict doctrine to mitigate its hardship by taking into consideration other conduct which forms the context to the "offence." The fallibility of dogma is conceded by the introduction of variations based on ordinary human conduct. Connivance and condonation are two particular examples of this, the reasoning running in this way: The husband commits an "offence" against his wife. She, however, consents to it in advance. The enormity of the "offence" is not reduced by this but the wife is precluded from relying on it later. *In pari delicto potior est conditio defendentis.* Or, she forgives him afterwards. Again, she cannot rely on it. The same principle applies to any "offence" adultery, desertion, cruelty [20]—or sodomy. So far as the latter is concerned, *Statham* is authority for an actual occurrence of the facts and a decision on them.

But this is to stay on an extremely formalistic plane. Turning to the alternative view already mentioned, many legal and psychosocial writers have urged that the courts should view matrimonial "offences" less in the light of exclusively significant acts and more in that of disorganisation within the family unit. They would then appear as mere symptoms of disturbance (or, if one dare use the word, incompatibility) and the evidence would be directed at

it was wrong, improper and unnatural, and she does not venture to say that she did not" (sodomy).

Hodson L.J. in *Bampton* [1959] 2 All E.R. at 767 A—"some disgusting sexual perversions"; at 768 H—"still other disgusting activities which took place between these two people" (*fellatio*). It is interesting to note that sodomy and bestiality almost never found their way into the original Divorce Bill at all, because the Lords "did not wish it to be defiled by any reference to those offences" (Lord Cranworth L.C., 147 Parl.Deb. 2021–2022).

19 *e.g.*, Lord Justice Hodson, "Some Aspects of Divorce Law and Practice" (1957) 10 *Current Legal Problems*, 1. Lord Morton and Pearce L.J. were both members of the majority of the Royal Commission on Marriage and Divorce which recommended in favour of retaining the doctrine of the matrimonial offence.

20 Connivance does not apply to petitions on the ground of cruelty and desertion by virtue of s. 4 of the Matrimonial Causes Act. The court, however, must inquire into its existence and it is obvious that proof of prior consent will remove the necessary element of "unjustifiability" from the offence in each case.

establishing this disturbance rather than the narrowly defined "offence." Consent and condonation are just as relevant here, of course, as punctuation marks in the family word-picture. Yet not even these should detract from the basic practical consideration that the *final outcome* of the family disturbance is disorganisation. There may *once* have been consent, there may *once* have been forgiveness, but these cannot alter the fact that there is now a desire (and frequently a mutual desire) to end the association. Or to put the functional problem another way: what will be the consequence of refusing a divorce?[21] The doctrine by which later conduct may revive a condoned "offence" has been a notable practical step in the direction of recognising these forces at work within the marriage but its limits are still too formally prescribed for it to be of widespread use.[22]

We can probably not arrive at any conclusions without first considering our third major issue—whether "consent" can always be delineated clearly, so as to give it some recognisable and unchanging content. A precise conceptual approach would, of course, consider this perfectly possible. Lord Justice Russell in *Statham* showed his belief in just such a state of affairs and he has been quoted on it ever since.[23] Husband and wife very calmly and rationally discuss the question of sodomy, the husband describes the exact physical act involved and the wife then places, or does not place, herself at his disposal for that purpose. According to this formula, a court can then say whether she consented or not.

[21] I am assuming that the objective reconciliation of the spouses as a means to general family reorganisation cannot be reached after the presenting of a petition for divorce, or, at least, cannot be reached in the individual case under consideration. As a general proposition, it certainly does not represent the experience of some social workers and marriage counsellors (see, *e.g.*, Mudd, "Contributions to a Therapeutic Solution to the Divorce Problem: Social Work and Marriage Counseling," Univ. of Chicago Conference Series, No. 9, 65–69 (1952); "The Social Worker's Function in Divorce Proceedings," 18 *Law & Contemporary Problems* 66, 68–69 (1953)) but it is probably true that in most cases reconciliation techniques will be least likely to succeed at this stage. Motivation is almost always entirely dissipated by this stage in the proceedings, meaning that there is a substantial obstacle to the necessary psychological adjustment. This still leaves questions of the welfare of the children of the marriage to be settled under the Matrimonial Proceedings (Children) Act, 1958, or otherwise—questions so vital that all others concerning the future of the family should be subordinated to them.

[22] *e.g.*, *Beard* v. *Beard* [1946] P. 8; *Richardson* v. *Richardson* [1950] P. 16; *Beale* v. *Beale* [1951] P. 48; *Beigan* v. *Beigan* [1956] 2 All E.R. 630; *Roe* v. *Roe* [1956] 3 All E.R. 478.

[23] Dealing with the wife's evidence, he thought it quite clear—"(1) that her husband explained to her quite plainly the exact physical act which he wished to do on her; (2) that she assented and placed her body at his disposal for the purpose of that act being committed; (3) that no compulsion of any kind was brought to bear on her; and (4) that the only reason given by her for refusing subsequent invitations to a similar act was fear of pain. It thus appears that the wife was a consenting party to the only act upon which a decree of divorce could be founded" ([1929] P. at 156). This mechanical test of consent has been cited with approval by, for example, Lord Goddard C.J. in *Lawson* v. *Lawson* [1955] 1 All E.R. 341, 344; Hodson L.J., *ibid.*; Hodson L.J. in *Bampton* [1959] 2 All E.R. at 770 B–C.

Lords Justices Hodson and Sellers, on the other hand, paid special attention in *Bampton* to the facts as they are more likely to occur.[24] As Lord Justice Hodson said, "It should be recognised that the relationship of husband and wife being what it is, and the obligations of one to the other being what they are, it is not readily to be taken against a wife in a situation such as exists in this case, especially a young wife, that there has been a real consent." In *Davidson* v. *Davidson*,[25] for instance, Karminski J. suggested that a very young wife who was persuaded by her husband that sodomy was one of "the normal incidents of married life," could not be held to have consented to it.[26] If this particular motivation negatives consent, then, what about compulsion of a stronger sort? Mrs. Bampton did at least have some creditable motives, for she was constantly being alerted to the danger of losing her husband to another woman.[27] One "normal" reaction to this might have been to do exactly as she did—indulge her husband, let time pass and hope that she could somehow keep the family together. Or, like Mrs. Bampton again, she might make an honest miscalculation of her ability to handle her husband or dissuade him,[28] only to find that she could never resist his very diplomatic demonstrations of affection.[29] One cannot help fearing that strict application of legal formulae does not favour those husbands and wives who try to carry on with their marriages, instead of giving in at the first sign of distress.[30] Undoubtedly, if Mrs. Bampton had heedlessly plunged into argument and recrimination with her husband and had perhaps even "fought him off,"[31] her case would have been stronger.[32]

In the light of this question of motivation, it becomes important to distinguish between full consent to an act and mere submission to it. It is a distinction clearly drawn in two related fields. In the criminal law, for instance, the offence of rape is committed when sexual relations take place *without the woman's consent* and not

[24] [1959] 2 All E.R. at 767 D, 772 B–C.

[25] [1953] 1 W.L.R. 387.

[26] Again, this is a subjective judgment. One wonders how many degrees of "normality" are possible in sexual relations and how many are permissible. It is interesting, too, to compare the plight of the inexperienced wife in *Davidson*, who was persuaded that the act was "normal," with that of the wife in *Statham*, who, according to two of the judges, "*must* have known that it was wrong, improper and unnatural" (italics added).

[27] [1959] 2 All E.R. at 768 C.

[28] *Ibid.* at 768 D.

[29] *Ibid.* at 768 B–C.

[30] I have tried to draw attention to this recently in the case of alleged "insincerity" in nullity petitions: (1959) 109 L.J. 551.

[31] The suggestion of counsel, quoted [1959] 2 All E.R. at 768 C. This would certainly accord with the older view that the act was so repulsive that no amount of persuasion ought to be effective. *Cf.* Patteson J. in *R.* v. *Jellyman* (1838) 8 C. & P. 604—"it was her duty to have resisted such an attempt to the utmost."

[32] As, for instance, in *Lawson*, *supra*. *Cf. N.* v. *N.* (1862) 3 Sw. & Tr. 234, where the court refused to believe either the wife's uncorroborated allegations of attempted sodomy, or her claim to have resisted them.

where they are merely *against her will.*[33] If a man has intercourse with a child, or on the pretext of performing a surgical operation, or by impersonating the husband, she does submit but will not be held to have consented.[34] Similarly, her realisation of the futility of resistance does not amount to her agreement.[35] In the sexual relations of husband and wife, there may likewise be some question of the domination of one partner by the other. *Coitus interruptus*[36] and contraception,[37] unobjectionable enough when agreed upon by the spouses, become legally significant when practised by one to the detriment of the health of the other. The "ground" for objection, of course, is cruelty. The wife actually participates in the sexual acts but does not ever really "consent" to the contraception. She may find it distasteful and may even actively object to it, yet for some reason or other (and not necessarily physical violence on the husband's part) she still engages in sexual intercourse. There is neither "consent" nor absence of "consent" but simply a state of resignation and acceptance. Afterwards, this frequently turns to regret.[38] If the acts therefore amount to cruelty, the submission does not preclude reliance on them. In suitable circumstances, could this not be true of sodomy?[39]

Love, fear, ignorance and jealousy play just as much a part in the decision-making of husband and wife as does reason. A court, therefore, should approach decisions clouded with emotion in a most careful manner. Consent is not consent unless one knows how it was given and what prompted the husband or wife to give it at all. If the House of Lords is going to perpetuate the doctrine of the matrimonial "offence," it will probably have to decide that proved consent to an act of sodomy bars relief on the statutory "ground." Hence, mere incompatibility which arises after the act—and which may or may not in part be caused by the regret and unpleasantness surrounding it—will once again be banished to the deserts of Nevada and Mexico. But both in this case and in the case based on cruelty, the analogy of the rape and contraception cases may lead to a closer consideration of "consent." Or

[33] *e.g.*, *Russell on Crime* (11th ed., 1958), i, 793–797; Archbold's *Criminal Pleading, Evidence and Practice* (33rd ed., 1954), § 1942; Note, "Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard," (1952) 62 Yale L.J. 55.

[34] *Ibid.*

[35] See, *e.g.*, *R.* v. *Jones* (1861) 4 L.T.(N.S.) 154; *R.* v. *Day* (1841) 9 C. & P. 722; *R.* v. *Hallett* (1841) 9 C. & P. 748.

[36] *e.g.*, *White* (*orse. Berry*) v. *White* [1948] P. 330; *Walsham* v. *Walsham* [1949] P. 350; *Cackett* (*orse. Trice*) v. *Cackett* [1950] P. 253; *Knott* v. *Knott* [1955] P. 249.

[37] *e.g.*, *Forbes* v. *Forbes* [1956] P. 16; *Ward* v. *Ward* [1958] 2 All E.R. 217.

[38] As, of course, happened in all the matrimonial cases cited here.

[39] It appears that Lord Goddard C.J. was expressly considering such a position in *Lawson* v. *Lawson*, *supra*, when he pointed out that the wife in question there, "although she may have submitted, was not a consenting party." The acts alleged were sodomy and masturbation.

there is the alternative approach. Given consent, given condonation, what is the whole picture of the relationship? Is there any purpose in continuing it? Can all the members of the family be suitably cared for, educated and accommodated if they no longer live together? *Statham* in 1929 was one of the innumerable cases in the course of the last hundred years which avoided these questions. It will be interesting to see how much judicial habits have changed since then.

ALAN MILNER.*

* LL.B., LL.M., Lecturer in Law, Queen's University of Belfast.

STATUTES

The National Insurance Act, 1959

The National Insurance Act has now received both royal and electoral assent. In April 1961, therefore, the National Insurance scheme will undergo several important changes. What these changes amount to in essence is that, on the one hand, the large annual deficits which were beginning to emerge, and which would otherwise have fallen on the Exchequer, will be made good by means of an additional contribution by employed persons and their employers, related to weekly earnings; while, on the other hand, those who have to pay this wage-related contribution are to be rewarded (some would say inadequately) with the promise of a corresponding addition to their retirement pensions.

The Government has never pretended that this additional pension will be an adequate substitute for a good private pension scheme. Indeed, one of the reasons given for pitching the benefits so low was that employers would not be faced with "the bare choice between abandoning their schemes and contracting out."[1] It is quite possible to accept the additional state pension as a supplement to the benefits offered by a private scheme, and no doubt many employers will do so, especially for their higher-paid employees. Nevertheless, the Act gives the employer an option of contracting out under certain conditions.

The contributions

Although on the benefit side the Act is concerned only with pensions, other National Insurance benefits remaining unchanged, it is important to note that the contribution rates set out in the First Schedule to the Act cover all benefits provided under the National Insurance Act, 1946. They are intended to come into force in April 1961, though section 1 leaves the date of commencement to be fixed by the Minister.

There are no changes in the contribution rates for the self-employed, the non-employed, persons under eighteen and employees who are contracted out. The new minimum rates, 11s. 7d. per week for a man and 10s. 9d. for a woman, divided equally between employed person and employer, apply only to employed persons aged eighteen and over, for each week in which they earn more than £3 but not more than £9. After adding the Industrial Injuries and National Health contributions, the total weekly contribution is

[1] Provision for Old Age: The Future Development of the National Insurance Scheme (1958) Cmnd. 538, p. 10.

15s. 4d. for a man and 13s. 6d. for a woman; somewhat less than the present contributions of 18s. 2d. and 14s. 9d., which those who are contracted out and their employers must continue to pay.

These are the minimum rates for adult contributors. In addition, for every income tax week in which an employed person aged eighteen or over and not contracted out receives over £9 on account of remuneration, he and his employer will be liable for a *graduated* contribution. The amount of this contribution, for both the employed person and the employer, will be "$4\frac{1}{4}$ per cent. of the amount, up to six pounds, by which the payment exceeds nine pounds (or of the equivalent amount for remuneration not paid weekly)."[2] Thus the maximum weekly graduated contribution, for employer and employee together, will be $8\frac{1}{2}$ per cent. of £6, or 10s. 2d. (all contributions being rounded off to the nearest penny). This means that the total contribution, flat-rate and graduated, for every week in which remuneration reaches or exceeds £15, will be 25s. 6d. for a man or 23s. 8d. for a woman. In effect there will be two levels of flat-rate contribution—one payable on earnings of £9 a week or less, the other on earnings of £15 a week or more—with a sliding scale in between.

To enable the machinery of PAYE to be used for collecting the graduated contributions, section 2 (1) defines remuneration for this purpose as "any emoluments assessable to income tax under Schedule E (other than pensions) being emoluments from which tax under that Schedule is deductible, whether or not tax in fact falls to be deducted from that payment." This definition excludes the earnings of certain professional persons who, although employed under a contract of service, are assessed under Schedule D; while others such as company directors and clergymen are excluded from paying graduated contributions because, although taxable under Schedule E, they are regarded as self-employed for National Insurance purposes.

The fact that graduated contributions will be levied only on earnings over £9 means that much administrative effort will be devoted to the collection of very small contributions. It also means that the contributions payable, and therefore the pension earned, over a given period may be affected by the fluctuating or seasonal nature of the remuneration.

The contribution rates are designed to produce sufficient revenue, year by year, to balance the expenditure of the National Insurance Funds with the help of a modest contribution from the Exchequer and the annual interest on the Funds. As the number of pensioners increases, higher contributions will be needed to achieve this aim. Section 1 (2) therefore provides for increases in the contribution rates in 1965, 1970, 1975 and 1980, though the actual amounts of the

[2] s. 1 (1) (*b*) (iii). The method of calculating the "equivalent amount for remuneration not paid weekly" will be laid down by regulations under s. 2 (5).

increases may, if the Minister so directs, be less than those laid down in this section.

The benefits

Apart from section 6, which increases the increments earned by deferring retirement, the Act leaves the existing flat-rate pension (50s. for a single person and 80s. for a married couple) unaltered. Sections 4 and 5, however, break new ground by introducing the additional "graduated retirement benefit." Each "unit" of graduated contributions paid by the insured person (*i.e.*, excluding the employer's contributions) earns an increase of sixpence in the weekly pension. The "units" are initially £7 10s. for a man and £9 for a woman, but as the contribution rates are raised, the size of the units will increase in the same proportion, so that the relationship between earnings and pension will be preserved. The larger unit for a woman reflects her longer average expectation of life and the fact that she can claim her pension five years earlier than a man.

The effect of this formula is that graduated contributions paid on each £1 of earnings between £9 and £15 a week for a year will result in an addition to the weekly pension of approximately $1\frac{3}{4}$d. for a man or $1\frac{1}{2}$d. for a woman. A man who consistently earns £15 a week or more will thus add about $10\frac{1}{2}$d. to his weekly pension for every year of his contributions. The graduated pensions earned in the early years of the scheme will thus be very small—a *maximum* of 9s. a week for a man retiring in 1971 after earning at least £15 a week for the previous ten years. These figures emphasise the fiscal aspect of the scheme. The graduated contributions in the early years are to be used almost entirely to finance the existing flat-rate benefits; and even in 1991–92, the Government Actuary has estimated that graduated contributions will exceed graduated pensions paid during the year by over £100 million.[3]

The graduated benefit is subject to the same general conditions as to retirement and post-retirement earnings as the existing flat-rate pension. Section 4 (8) empowers the Minister to exempt the graduated benefit from the earnings rule, a logical exemption since no private pension scheme has an earnings rule; but it is apparently the Minister's intention to reserve this power until graduated benefits of significant proportions begin to be payable. If retirement is postponed after pensionable age, graduated contributions will continue to be paid. In addition, half the graduated pension lost for each week that retirement is deferred is to be added to the contributions paid for the purpose of assessing the graduated pension when it becomes payable.

[3] Report by the Government Actuary on the Financial Provisions of the Bill (1959) Cmnd. 629.

Section 5 deals with the benefits payable to a widow by virtue of her husband's graduated contributions. On reaching pensionable age, she is entitled to half the graduated pension earned by his contributions, in addition to any pension earned by her own contributions—always subject to the retirement condition.

Contracting out

Part II of the Act and eleven pages of Regulations deal with the complicated provisions relating to " non-participating employments " (the expression " contracting out " does not occur in the Act). No useful purpose would be served by an attempt to summarise here the whole of these provisions, but it may be helpful to indicate some of the main points.

A non-participating employment must provide a recognised superannuation scheme giving retirement pensions which are " on the whole as favourable as the right to benefit to be derived from graduated contributions (in this Act referred to as ' equivalent pension benefits ')." [4] A superannuation scheme is " recognised " if it is established by Act of Parliament or other instrument having the force of law (as in the case of the civil service), or if it secures the payment of " equivalent pension benefits " by irrevocable trust, contract of assurance or annuity contract satisfying certain conditions prescribed by the Regulations.[5, 6] " Equivalent pension benefits " must include a pension at age sixty-five (sixty for women), which is payable for life and cannot be wholly surrendered, commuted or assigned, and which is not less than the graduated benefit obtainable under the Act by weekly contributions at the maximum rate throughout the period of service.[7]

The decision as to whether all these conditions are satisfied in respect of a particular employment must be made by the Registrar appointed under the Act, on the application of the employer. The employed person has no choice in the matter (a denial of individual rights which raises wider questions of principle), though his employer must inform him of his intention to apply to the Registrar. If the Registrar decides that the employment can be treated as non-participating he will issue a certificate to that effect, and the employment will then be non-participating as long as the certificate remains in force and the other conditions are satisfied.

If an insured person leaves a non-participating employment or his employment ceases to be non-participating, either he must be assured of " equivalent pension benefits " in respect of such employment (by means of a " frozen " pension or an appropriate payment to another pension scheme) or the employer must pay to the National

[4] s. 7 (2) (*a*).
[5] National Insurance (Non-Participation—Benefits and Schemes) Regulations, 1959.
[6] s. 8 (4).
[7] s. 8 (1).

Insurance Fund the difference between the maximum contributions (flat-rate plus graduated) that would have been payable by a person earning £15 a week and the flat-rate "contracted out" contribution for the period covered by the employment. This is described as a "payment in lieu of contributions." A half of any such payment may be recovered by the employer out of any refund of contributions to which the insured person is entitled, provided that the payment and the refund are in respect of the same period.[8]

This is not the place to discuss the pros and cons of contracting out. The factors to be considered will depend on the circumstances of each case. The Act permits an employer to contract out in respect of certain categories of employees, and a good deal of mathematical juggling may be involved in arriving at the most profitable arrangement.

One factor which will influence decisions on contracting out is the certainty that this Act is no more than a stepping stone. Whether or not the Labour Party's more ambitious scheme is ever put into operation, it is obvious that the levels of benefit set by this Act will not remain unchanged for long. If earnings rise at 2 per cent. per annum, as was assumed in the financial estimates on which the Act is based,[9] the £15-a-week man of 1961 will be earning £30 a week by 1998. He will hardly be content to retire on a pension of at most £4 3s. It is true that employers who contract out in 1961 can return to the fold later if they find themselves unable to cope with increased benefit rates; but many will feel that the future uncertainty and present complexity of contracting out outweigh its advantages.

Tony Lynes.

Legitimacy Act, 1959

The number of important statutes which affect the family is growing, and it is not too soon to ask whether a general consolidation of the statute law on domestic relations should not be attempted. The Legitimacy Act, 1959, deals with a number of very important, partly fundamental, matters of family status. Its general effect is to reduce the incidence of illegitimacy and also further to reduce the difference between the status of legitimate and illegitimate children. This is, as it were, the common factor of many of its provisions, but otherwise these provisions deal with a number of topics all of which concern illegitimacy, but none of which is otherwise very closely connected with any other.

(1) Under the Legitimacy Act, 1926, legitimation by the subsequent marriage of the parents did not apply to a child whose father or mother was married to a third person when the child was born.[1]

[8] ss. 7 (3) and 10.
[9] (1959) Cmnd. 629.
[1] s. 1 (2) of the 1926 Act.

Although by a majority of twelve to seven the Royal Commission on Marriage and Divorce [2] recommended that what many people regarded as an indefensible atavism should remain on the statute book, and although a considerable struggle about this had to be fought in the House of Lords, the new Act, in its section 1, repeals section 1 (2) of the 1926 Act, and henceforth the *filius adulterinus* will in this country, as in many other civilised countries, be legitimated by the subsequent marriage of his parents. The Act is retrospective to the extent that if the child was alive at the time of the coming into force of the Act and the parents had married before that date [3] he is legitimated as from the coming into force of the new Act. Nothing will in future prevent an English court applying section 8 of the 1926 Act so as to recognise the legitimation of a *filius adulterinus* under a foreign law if the father was domiciled in its area at the time of the marriage.

(2) The absence of any rule by which the children of void marriages are legitimate provided at least one of the parents believed in the existence of a valid marriage, was another atavism of English law the removal of which was overdue. Children of voidable marriages are legitimate under section 9 of the Matrimonial Causes Act, 1950, and the Royal Commission on Marriage and Divorce recommended (No. 147) that this should be extended to children of void marriages provided either parent was bona fide. In other words they proposed that English law should broadly adopt the principles which in this respect prevail in Scotland, and this has now been carried into effect by section 2 of the new Act. If one considers that a marriage is void (not voidable), *e.g.*, where the girl is in fact under sixteen but herself thinks she is older and where (whatever she thinks) the husband genuinely believes she is over sixteen, and that this invalidity could be pleaded by anyone at any time for the purpose of attacking the legitimacy of the children or remoter issue, one can see that the reform comes none too soon.[4] It removes a grave injustice, but it gives rise to quite a number of difficult problems.

(a) Whereas the child of a voidable marriage is legitimate irrespective of the bona fides of the parents (it is in the nature of the grounds of voidability that the question will only very rarely arise), the child of a void marriage is legitimate only "if at the time of the act of intercourse resulting in the birth (or at the time of the celebration of the marriage if later) both or either of the parties reasonably believed that the marriage was valid." "Either or both": this would seem to be particularly important in the case of bigamous marriages if, *e.g.*, the woman did not know and had no reason to think that the man was a bigamist. The standard, is however, not purely subjective: the belief must

[2] Cmd. 9678, Rec. 146.
[3] October 29, 1959.
[4] Marriage Act, 1949, s. 2.

be "reasonable." It will also be noted that knowledge supervening after the marriage will render illegitimate any children subsequently conceived, whereas older children of the same parents will be legitimate.

(b) The child must be the child of "a void marriage," and it is quite clear that there is (now at least, under this Act) a difference in English law between a "void marriage" and "no marriage," between *matrimonium nullum* and *matrimonium non existens*. If a person is under the delusion of having gone through a ceremony he or she is not living in a "void marriage." There must, so it appears, be at least something like the semblance of a "celebration," and one may wonder how this will work in those cases in which, as in *Wolfenden* v. *Wolfenden*,[5] the old rule *consensus facit nuptias* still applies. The relevant belief of the parties is "that the marriage was valid," not "that they were validly married," and what the "void marriage" is emerges from section 2 (5): it must be a "something" in respect of which the High Court could have made a decree of nullity (and not a mere declaration that the parties were not married). It should be noted however that the classical case of the *matrimonium non existens* (the layman impersonating a priest) has no parallel in English law because in such a situation the marriage is valid unless the spouses acted "knowingly and wilfully."[6]

(c) It is becoming less and less comprehensible why the distinction between void and voidable marriages should be continued at all. It is steadily losing in importance. How much better it would be if all "void" marriages were made "voidable," except perhaps bigamous marriages. What is however more important is that the new Act has done nothing to disturb what must be one of the most extraordinary features of English law, namely, that anyone can at any time attack the legitimacy of a person and that this can be done collaterally, *i.e.*, in any proceedings or in no proceedings at all. Should there not be something like the French *désaveu*, *i.e.*, the need for a disclaimer of the child by the mother's husband before its legitimacy can be attacked, and has this need not been increased by the provisions of the new Act under which not only the *filius adulterinus* but also the offspring of a bigamous union can be the legitimated or legitimate child of the natural parents?

(d) The conflict of laws problems connected with the legitimacy of children are exceptionally difficult. Suffice it therefore here to say that[7] the new rule applies and applies only where the father was domiciled in England at the time of the child's birth, or if he died before the birth of the child at the time of his death. This is the conflicts rule which will apply. Section 2 (5) which defines

[5] [1946] P. 61.
[6] Marriage Act, 1949, ss. 25, 49.
[7] s. 2 (2) of the Act.

a "void" marriage does not yield a conflicts rule because it says that a "void marriage" includes a marriage in respect of which the High Court would have or would have had jurisdiction to grant a nullity decree had the parties been domiciled in England, *i.e.*, it eliminates the conflicts point and defines the "marriage situation" deliberately without regard to the connecting factors in space.

(e) The retroactive effect of the new provision is limited: it applies only to the intestacy of a person who dies after the commencement of the Act and to the assurance of a property interest by an instrument *inter vivos* or by will only if such disposition comes into operation after the commencement of the Act.[8] Special provisions apply to succession to a dignity or title of honour and the devolution of property settled therewith.[9]

(3) In *Re C.T.*[10] it was held that the father of an illegitimate child had no right to apply for the custody of the child before the justices under the provisions of section 16 of the Administration of Justice Act, 1928, and it appears that the mother had no such right either, *i.e.*, that section 5 of the Guardianship of Infants Act, 1886, did not apply to her, although [11] section 5 (2) of the Guardianship of Infants Act, 1925, did and she was able to appoint a testamentary guardian. What this meant was that, although the High Court can in matrimonial causes deal with the custody, education, etc., of an illegitimate child of parties whose marriage is before the court,[12] a court of summary jurisdiction could not, except in the very anomalous situation which may arise under section 5 (4) of the Affiliation Proceedings Act, 1957, regulate the custody of an illegitimate child. Here section 3 of the new Act makes a change by giving the mother and the father of an illegitimate child the right to apply for a custody order before the Chancery Division, a county court, and, if the child is under sixteen, a court of summary jurisdiction.[13] In no circumstances however can a court make a maintenance order concerning an illegitimate child under section 3 (2) of the Guardianship of Infants Act, 1925; on the financial side the two kinds of children remain rigidly separated: here the machinery of the Summary Jurisdiction (Separation and Maintenance) Acts and of the Guardianship of Infants Acts is reserved to the legitimate children, and those who are illegitimate can expect no more than what they are given by the Affiliation Proceedings Act.[14]

[8] s. 2 (4) and (5) of the new Act, and s. 11 of the 1926 Act.
[9] s. 2 (3), (4), (5).
[10] [1957] Ch. 48.
[11] *Re A.* (1940) 164 L.T. 230.
[12] *Galloway* v. *Galloway* [1956] A.C. 299; and Matrimonial Proceedings (Children) Act, 1958, s. 1.
[13] Guardianship of Infants Act, 1886, s. 5; Administration of Justice Act, 1928, s. 16; Guardianship and Maintenance of Infants Act, 1951, s. 1 (1); Guardianship of Infants Act, 1925, s. 7 (1) proviso (*a*).
[14] See s. 3 (2) of the new Act.

The father of an illegitimate child who has obtained a custody order becomes in the event of the mother's death the child's guardian by survivorship by virtue of section 4 of the Guardianship of Infants Act, 1925, and, if he is still entitled to custody at the time of his own death, his testamentary appointment of a guardian will take effect as if he had been the father of a legitimate child.[15] See section 3 (3) of the new Act. Is he also a " parent or guardian " of the infant so that his consent to an adoption is required under section 4 (1) (*a*) of the Adoption Act, 1958? It would be in the spirit of the new Act to answer the question in the affirmative.[16]

(4) It remains to note that the definition of a " single " woman for the purposes of the Affiliation Proceedings Act has been amended by section 4 of the new Act, that by section 5 the special provisions of the Magistrates' Courts Act, 1952, on domestic proceedings will in future apply to affiliation proceedings, and that nothing in the Act applies to the succession to the Crown.[17]

O. Kahn-Freund.

Two Notes on the Fatal Accidents Act, 1959

The guiding principle in assessing damages under the Fatal Accidents Acts has always been that the loss suffered by the dependants must be balanced against any pecuniary advantages coming to them as a result of the death of the breadwinner. This principle was qualified by exceptions, mainly concerning insurance payments and such gratuities which could not reasonably be expected. The list of these exceptions has now been consolidated and extended in section 2 of the Fatal Accidents Act, 1959, to such an extent as to make freedom from accountability the rule rather than the exception. Dependants will no longer have to account for any pension, including return of contributions and lump sums paid in respect of employment; this will also apply to gratuities whether or not there had been reasonable expectation that they would be paid.

The new principle governing the assessment of Fatal Accident damages will ensure that pensions and gratuities, whether expected or unexpected, will benefit the dependants rather than the wrongdoer responsible for the death of the breadwinner. Another incidental advantage of the new principle will be that it will remove the temptation to strain the meaning of the existing exceptions to the requirement of accountability. Thus, in *Smith* v. *British European Airways Corporation*,[1] an attempt was made, unsuccessfully, to describe a payment of death benefit under a pension

[15] s. 5 of the 1925 Act.
[16] I am indebted to Mr. L. Blom-Cooper for drawing my attention to this point.
[17] s. 6 (3).
[1] [1951] 2 K.B. 893.

scheme as payment under a contract of insurance in order to bring it within the words of the Fatal Accidents (Damages) Act, 1908. In *Green* v. *Russell* [2] (for comment see 22 M.L.R. 96) the attempt to extend the words of this Act to contracts of insurance to which the deceased breadwinner was not a party and in respect of which he had no rights as a third party beneficiary did succeed, although ultimately, on appeal, only subject to some vague reservations.[3] The decision of the court of first instance relied on the theory that the words " any sum paid or payable on the death of the deceased under any contract of assurance " in the Act of 1908 were intended to label the payment and not to draw a distinction between payments under contract and gratuitous payments. The Act of 1908 is now repealed and for it is substituted the formula " there shall not be taken into account any insurance money which has been or will or may be paid as a result of the death." It seems very doubtful whether this should be taken as statutory endorsement of the " labelling theory." In future, whenever money received from insurers is handed over voluntarily to dependants it will be possible to describe the transaction simply and naturally as payment of a gratuity. As such, the dependants will not have to account for it. The question whether the money paid should be labelled as insurance money is, therefore, likely to remain one of the unsolved academic mysteries of the law.

Only one other point calls for comment. Section 1 of the new Act enlarges the class of dependants by adding brothers, sisters, uncles or aunts, or their issue. In deducing relationships adopted persons are to be treated as children of adopters and not as children of their natural parents. Section 1 (3) then provides that " adopted " means adopted by an adoption order made under the Adoption Act, 1958, or previous Acts, or corresponding legislation in Northern Ireland. If this means that foreign adoptions are to be ignored for the purposes of the Fatal Accidents Acts, then one must ask why foreign adoptions should be treated differently from foreign marriages or foreign legitimations. There is now a growing volume of opinion which holds that such discrimination against foreign adoptions in the matter of succession rights is unjust and contrary to the principles which govern the recognition of status. This discrimination was established in *Re Wilson* [4] and *Re Wilby* [5] in reliance on the provisions of section 13 (4) of the Adoption Act, 1950, on which section 1 (3) of the Fatal Accidents Act, 1959, appears to have been modelled. The new enactment may well be expected to increase the difficulty of persuading the courts that *Re Wilson* and *Re Wilby* should not be followed. The fact that this was probably not intended can only serve to underline regret

[2] [1958] 1 Q.B. 28.
[3] See 22 M.L.R. 519.
[4] [1954] Ch. 733.
[5] [1956] P. 174.

that a useful and progressive piece of legislation should have been marred by mechanical elaboration of definitions.

J. Unger.

The Fatal Accidents Act, 1959, does two things: it enlarges the circle of "dependants" entitled to claim damages under the Fatal Accidents Acts and kindred legislation, and it rationalises the principles which govern the disregard of "compensating advantages" in the assessment of damages for the benefit of dependants.

(1) *The meaning of "dependants"*

(a) By section 1 (1) the family will, for the purposes of this legislation, in future include brothers, sisters, uncles, aunts, and their issue. This is a most interesting revival of the recognition of kinship relations as a source of legal rights. Recent sociological research suggests [1] that their social significance may have been underestimated. The provisions of the National Assistance Act, 1948, which terminated the legal liability to mutual support of ascendant and descendant relatives (with the exception of the parents' liability to their children) expressed the conviction that, outside the household community, the family had ceased to be a living economic unit. The present Act shows in a way a result of new insights into the relevance of kinship ties between lateral relatives. The law presupposes that financial dependence on the resources of such relatives is a sufficiently typical phenomenon to be taken into account in the assessment of damages.[2]

(b) The provisions in section 1 (2) (*a*) and section 1 (3) about the inclusion of persons related through adoption and the exclusion of persons related through natural ties but adopted into another family follow the trend of recent legislation, and especially of the Adoption Act, 1958, to transform adoption into as complete a replica as possible of natural kinship. It is perhaps regrettable that the restriction of this effect to United Kingdom adoption might suggest to a court to disregard foreign adoptions for the purpose of applying the Act.

(c) Persons related by affinity, relations of the half-blood, and stepchildren are included by section 1 (2) (*b*), and, by section 1 (2) (*c*) an illegitimate child is, for the purpose of the Fatal Accidents Acts, to be treated as the legitimate child of his mother and also of his reputed father. The latter provision expresses the general policy, also pursued in the Legitimacy Act, 1959, and in many other modern enactments, of reducing the significance of the difference between legitimate and illegitimate relation. It will be noted that the law

[1] M. Young and P. Willmott, *Family and Kinship in East London*, 1957.

[2] For the extent to which the law takes account of kinship relations see the excellent article by P. Willmott, "Kinship and Social Legislation," *British Journal of Sociology*, vol. 9, No. 2 (June 1958), p. 126.

speaks of the "reputed" father, and this indicates that an illegitimate child or other relative of a man may recover Fatal Accidents Act damages although the man was not made liable to support in affiliation proceedings.

(d) By the two concluding subsections (4) and (5) of section 1 the effect of the redefinition of relevant family relations for the purposes of the Fatal Accidents Act has been extended to the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (which deals with the liability of several tortfeasors) and to the Carriage by Air Act, 1932.

(2) *The disregard of compensating advantages*

Under the previous legislation as interpreted by the courts, especially under the Fatal Accidents (Damages) Act, 1908, and under the Law Reform (Personal Injuries) Act, 1948, s. 2 (5), private insurance money and social insurance benefit of any kind payable on the deceased's death was disregarded, *i.e.*, not deducted from the damages payable by a tortfeasor, but other pensions, *e.g.*, those payable under a Royal Warrant [3] or under a contributory pensions scheme [4] were taken into account. The latter is obviously a matter of growing importance, not only in view of the provisions of the National Insurance Act, 1959. Moreover, the line which separated a private pensions scheme from a private insurance scheme was very fine indeed.[5] Section 2 of the new Act puts an end to these subtleties: In future there shall not be taken into account "any insurance money, benefit, pension or gratuity which has been or will or may be paid as a result of the death," and "benefit" includes benefit under the National Insurance Acts of Great Britain and of Northern Ireland, as well as friendly society or trade union benefit payments, "insurance money" includes the return of premiums, and "pension" a return of contributions and any lump sum payments in respect of a person's employment. The words "may be paid" suggest that a reasonable expectation without legal claim is covered, *i.e.*, to be disregarded.[6]

The question may be asked whether the corresponding problem which arises in connection with non-fatal accidents and which is no less subtle and complicated should not also one day be solved by legislation.[7]

O. KAHN-FREUND.

[3] *Johnson* v. *Hill* [1945] 2 All E.R. 272. This was under the Royal Warrant of December 1943 (Cmd. 6489), Art. 56.
[4] *Lory* v. *Great Western Ry.* [1942] 1 All E.R. 230; *Smith* v. *B.E.A.* [1951] 2 K.B. 893.
[5] See *Bowskill* v. *Dawson (No. 2)* [1955] 1 Q.B. 13 (C.A.).
[6] Thus *Baker* v. *Dalgleish S.S. Co.* [1922] 1 K.B. 361 (C.A.) is no longer law.
[7] Compare, *e.g.*, *Payne* v. *Railway Executive* [1952] 1 K.B. 26 (C.A.) and *Bradburn* v. *Great Western Ry.* (1874) L.R. 10 Ex. 1, with the provisions in the Law Reform (Personal Injuries) Act, 1948, ss. 2 (1) and (2).

REPORTS OF COMMITTEES

Conflicts of Jurisdiction Affecting Children

Technical questions on the conflict of laws do not often find their way into the daily Press, but some time ago the newspapers began to take an interest in the conflicts of jurisdiction over children which had arisen between the English and the Scottish courts. Early in 1958 the Lord Chancellor appointed a Committee including English and Scottish judges and lawyers under the chairmanship of Lord Justice Hodson

> " to consider and report what alterations in the law and practice are desirable to avoid conflicts of jurisdiction between courts in different parts of the United Kingdom in proceedings relating to the custody of children and to wards of court and to ensure the more effective enforcement of orders made in such proceedings outside the part of the United Kingdom in which they were made."

This Committee has now made its Report,[1] and the legal chaos which it reveals is remarkable. That the substantive principles which govern the law of custody over children are quite different in England and Scotland is well known: indeed one of the most acute problems arises from the restriction of custody orders in Scotland to minors under the age of sixteen. This lack of uniformity in substantive law would, however, hardly give rise to any complaint in practice if there were any reasonably clear principles either of choice of law or of choice of jurisdiction so as to obviate the danger of a clash in an individual case. Since in all three parts of the United Kingdom the courts always apply the *lex fori* in all matters concerning the custody of infants or minors, order can be produced only through uniform rules of jurisdiction, and it was this question to which the Committee addressed its main attention.

Quite apart from the difference in jurisdictional criteria between the three law districts concerned, the rules governing jurisdiction over the custody of children are, in each part of the United Kingdom, so complicated as almost to defy analysis. This is especially true of England where the dichotomy between law and equity affects the matter (otherwise than in Scotland) and where the jurisdiction of inferior courts goes further than in Northern Ireland. In England one has to take into account (1) the inherent powers of the Chancery Division, (2) its jurisdiction under the Guardianship of Infants Acts, (3) that of the Queen's Bench Division in habeas corpus proceedings, (4) that of the Probate, Divorce and Admiralty Division in matrimonial causes, (5) that of the county courts under the Guardianship

[1] *Report of the Committee on Conflicts of Jurisdiction affecting Children*, Cmnd. 842.

of Infants Acts, (6) that of the magistrates' courts under the same Acts, (7) that of the magistrates' courts under the Summary Jurisdiction (Separation and Maintenance) Acts, (8) that of the magistrates' courts under the Affiliation Proceedings Act. In some cases the jurisdiction is defined by statute, in others by case law. The criteria of jurisdiction vary from one court or division or type of procedure to another. They include—this enumeration is not exhaustive —mere presence of the child " within the realm " or within the jurisdiction, domicile, residence of the mother or the " respondent " (normally the father), or of the child, " matrimonial home." To set out the grounds on which each court exercises jurisdiction in each type of proceedings would not only be tedious but quite incompatible with the purpose of a note such as this. The statutes governing magisterial jurisdiction over infants should be very attractive to those who are fond of the more exacting kind of chess problem.

Nor is all this offensive only to an academic lawyer's morbid passion for " tidiness." The real trouble arises in those cases in which the child or his parents are somehow connected with Scotland where the principles of jurisdiction are quite different from anything in the law of England or of Northern Ireland. In practice the greatest difficulties are caused by the clash between the jurisdiction of the Chancery Division over all persons under twenty-one present in England or Wales and that of the Court of Session, which claims jurisdiction over all persons under sixteen present in Scotland but recognises [2]:

> " that the pre-eminent jurisdiction rests in the courts of the domicile of the father of the child, and in the case of a child whose father is domiciled elsewhere, would be slow to make an order other than an interim order for the protection of such a child."

That the Chancery Division is not at all " slow " to deal with the custody of children domiciled in Scotland but present in England, even if the infant is over sixteen, is a matter of which Scottish lawyers complain. The complaint acquires a somewhat vivid hue in a case such as *Babington* v. *Babington* [3] in which an order of the Court of Session as the court of the domicile was set at naught by a contrary order of the court in England where the child went to school, a situation, needless to say, reflecting a matrimonial dispute, and not unreasonably known among Scots lawyers as " legal kidnapping."

The Committee made no recommendations on the jurisdiction of any inferior courts but it took the view that the principle of " pre-eminent " jurisdiction should be extended to the superior courts in England and in Northern Ireland.[4] In England this would, if the Report was adopted, certainly apply to all proceedings in the

[2] Para. 23 of the Report.
[3] 1955 S.C. 115. See para. 39 of the Report.
[4] Paras. 60 (i), 47–49.

Chancery Division, and in matrimonial causes to the extent that[5] " where proceedings as to the custody of children have been instituted in a court of pre-eminent jurisdiction . . . the decision as to the future of the children should be left to that court." The effect of the recommendations on habeas corpus proceedings is not quite clear.[6] Except in cases of urgency[7]—and then subject to the control of and variation by the court of " pre-eminent jurisdiction "—the Chancery Division would exercise powers over children only if it was that court, and even then the child could, if over sixteen and domiciled in Scotland, raise a plea in bar.[8]

But what should be the criterion of " pre-eminent jurisdiction "? Domicile was rejected unanimously, on the convincing ground that if it were adopted lengthy questions especially on intention might arise, and on the less convincing ground that domicile mattered only in " conflicts of international law."[9] Surely, if against all the odds, Parliament arrived in the fullness of time at a more rational definition of domicile, especially with regard to a presumption of intention, the argument against domicile as a jurisdictional criterion would lose much of its force. Still, if married women were enabled to establish a domicile of their own, and in any event even according to the present law in the case of children whose parents are divorced, there would remain possibilities of conflict between the courts, and, on the whole, the Committee was probably wise in ruling out domicile. This means of course that the adoption of the Report would involve a change of the law in Scotland as well.

What should in Scotland take the place of domicile and what should be the new criterion of pre-eminence in England and in Northern Ireland was a question on which the Committee was divided. The majority was in favour of the " ordinary residence of the child at the time of the application,"[10] and they refused to attach any qualifying period. Among several courts of ordinary residence the one in which proceedings were first instituted should have pre-eminence,[11] and if it was claimed that after the making of an order the child had changed his ordinary residence the jurisdiction of the original court should nevertheless continue until that court was satisfied in proceedings instituted for the purpose that the change had taken place.[12] Cases of urgency apart, any court other than that of the place of ordinary residence should dismiss any custody application *in limine* (without referring it to the appropriate court)[13] and the parties should not be free to establish jurisdiction by consent.[14]

[5] Paras. 60 (v), 53.
[6] The question is however discussed in Mr. Albery's Note of Dissent, para (12).
[7] Paras. 60 (iv), 52.
[8] Paras. 60 (vi), 55.
[9] Para. 44.
[10] Paras. 60 (i), 49.
[11] Paras. 60 (iii), 51.
[12] Paras. 60 (ii), 50.
[13] Para. 51.
[14] Para. 52.

In a dissenting note Mr. Michael Albery, Q.C., pointed to some of the disadvantages connected with "ordinary residence" as the criterion of pre-eminent jurisdiction. He mentioned [15] the difficulty of determining the ordinary residence of a child of a recently broken home, and also denied that the adoption of this test would eliminate the danger of "legal kidnapping." Indeed, it is impossible to disagree with his view that on the ground of uncertainty as well as by reason of the possibilities of undesirable stratagems "ordinary residence" as a criterion of pre-eminent jurisdiction would do little if anything to cure the evils with which the Committee was expected to deal. Mr. Albery recommended as such criterion "the last joint home in the United Kingdom of the child's parents," [16] a proposal similar to that made by Council of the Society of Writers to the Signet.[17] This would certainly eliminate "legal kidnapping" and it would also have the advantage of clarity. On these grounds it is preferable to "the ordinary residence of the child." Its adoption, might, however, lead to injustice and grave inconvenience in those cases in which a long time has passed since the break-up of the home. If the parents last lived together in one part of the United Kingdom and the father or mother, after a separation or a divorce (and in the latter case perhaps after a remarriage), has taken the child to another part, why should the courts of the last joint home, perhaps after many years, have any say over the custody of the child? And what about the semi-orphan or the full orphan or the illegitimate child?

The present writer finds Mr. Albery's criticism of the majority report convincing without being able to see a solution in his primary suggestion. Might not the best solution, or (which is the same thing) the least of all evils, be found in Mr. Albery's alternative proposal to adopt the test of ordinary residence but to disregard any change of residence which occurred within six months prior to the application? [18] And, above all, should one not emphatically endorse his further recommendation [19] that the question of pre-eminence should only be raised if either party objected to the exercise of jurisdiction by the court?

The Committee unanimously recommended that custody orders should be reciprocally enforceable between the three parts of the United Kingdom, somewhat in the way in which maintenance orders are now enforceable [20] and that in all parts of the United Kingdom the court should have a discretion to hear applications *in camera*.[21]

[15] Dissent, paras. 2–7. Mr. Albery points out, *inter alia*, that in a situation such as that of the *Babington* case the child would, according to the interpretation of that term in revenue cases, have an "ordinary residence" where he or she goes to school.
[16] Dissent, para. 2.
[17] *Ibid.*, para. 9.
[18] *Ibid.*, para. 11.
[19] *Ibid.*, para. 12.
[20] Report, paras. 60 (vii), 56.
[21] Report, paras. 60, (viii), 57, 58.

It will be noted that none of the matters discussed in the Report have anything to do with cases of an "international" character. As regards foreign countries the principle of "pre-eminent" jurisdiction would not apply, and we would thus have a case in which "international" conflicts of jurisdiction would be treated in a way different from that applicable to "interlocal" conflicts in the United Kingdom. In relation to foreign countries the welfare principle enshrined in section 1 of the Guardianship of Infants Act, 1925, will remain—as it should—the "first and paramount" consideration in deciding whether jurisdiction should be exercised.

O. K.-F.

Report of the Committee on the Rating of Charities and Kindred Bodies

When in 1950 responsibility for rating assessment passed from the local authorities to the Department of Inland Revenue, the problem of charity raised its head in a new guise.[1] The object of the transfer was to secure a uniformity in standards of valuation, and it immediately became apparent that loss would ensue to a large number of charitable and near-charitable organisations who for over one hundred years had secured relief from full rate payment by various "sympathetic" local assessments. Degrees of under-valuation were as various as the kinds of bodies which enjoyed it, and consequently in the Rating and Valuation (Miscellaneous Provisions) Act, 1955, Parliament in broad terms froze the rating relief of those organisations as it stood in 1955–56. This measure protected the organisations from the effects of the new valuation lists which came into force on April 1, 1956, and gave time for further study. Ultimately, in January 1958, the Minister of Housing and Local Government appointed a committee under Sir Fred Pritchard to review the treatment of organisations affected by section 8 of the 1955 Act and the Scientific Societies Act, 1843, and to advise on a permanent rating treatment. The Minister originally hoped to have the report by the end of 1958, but delays set in which partly necessitated the continuation of the temporary freezing process until April 1963,[2] and the report was finally published on September 3, 1959.

It was evident in 1958 that any committee faced with a single aspect of the charity problem would find it difficult to pick its way through the anomalies and inconsistencies, and finally produce a solution which would appeal to both Government and

[1] On an earlier occasion ((1959) 12 *Current Legal Problems* 115) the present writer considered the nature of the problem confronting the then sitting Pritchard Committee, and made suggestions as to a solution. This comment is written against the background of that paper.

[2] Rating and Valuation Act, 1959, s. 2.

legislature, but the rating problem also involves a broad clash of interests between the majority of local authorities on the one hand and the affected organisations on the other. And behind this clash lies the controversy which readily surrounds the relationship of central and local government financing. Any recommendation concerning the rate relief of charitable and kindred organisations is therefore the result of a balance of interests, and within its terms of reference the Pritchard Committee could not hope to do more than suggest a reasonable compromise. Moreover, it was compelled to accept both the Government's disinclination to change the definition of charity, and also the existing principles of valuation for rating. To add salt to the dish the Government excepted consideration of a considerable portion of charitable property, namely, churches, chapels, and church and chapel halls. Whatever other recommendations were made, these properties were presumably to continue with their existing relief arrangements.[3]

Faced with such a situation, the Committee has tackled its problem with a certain robust realism. "We think that it is impracticable to eliminate all elements of arbitrariness; in considering charities and kindred bodies our object has been to find a reasonable balance of conflicting arguments and interests, consistent with simplicity, certainty and economy in administration." In this mood the Committee argues first that there is a case for assistance to these bodies on the prime basis that to most people's approval the local authorities have hitherto in various forms given assistance. Having thus associated assistance and local authority responsibility, the Committee presumably saw no need to consider whether the Exchequer rather than local authorities should bear the cost of relief in order that neither through derating nor direct relief would the rating system carry further anomalies. However, it is interesting to note that the only published evidence given before the Committee is that of the Treasury, whose memorandum (Appendix VII) emphatically rejects any suggestion that the Exchequer give added assistance either to the organisations or to the local authorities by way of reimbursement. Only through the existing rate-deficiency grants is the Treasury willing to concede any aid, and, as the memorandum points out, such is the national pattern of the grant system that some local authorities might even as a result of change derive a smaller grant.

This memorandum is as significant as the report itself. It discharges all Treasury responsibility on the grounds that since the last war direct taxes have increased sixfold, indirect taxes fivefold, and rates have only doubled. It is arguable that all Exchequer aid should be brought within the rate-deficiency grants, but merely distressing to see the relationship of central and local financing discussed on the basis of relative burden, and not on the relationship

[3] Rating and Valuation (Misc. Prov.) Act, 1955, s. 7.

of charity assistance to the function of central taxes and local rates. Particularly is this so in a field where Arts Council and Government grants are increasingly larger.

The rating system could have been saved from the anomaly of direct relief (the authorities were adamantly against further derating) by way of local authority grants, but this is dismissed on the sensible ground that the gallant experiment as well as the thriving organisation deserves assistance. Grants tend to go to the established organisations. So that it becomes a matter of discretionary or mandatory rate relief, and the Committee advocates the second in its desire to introduce "a measure of uniformity and certainty into the rating reliefs" enjoyed by the organisations. In the writer's opinion this is a sound conclusion, and it is all the more odd to find "a cogent argument against mandatory relief" in the fact that all relief prior to 1956 was discretionary. The anomalies of the old system were deplorable, and few organisations dare raise a voice against them for fear of repercussions.

But it is in its recommendation concerning the category of organisations who are to enjoy mandatory relief that the Committee is chiefly to be applauded. It is suggested that section 8 of the 1955 Act be repealed, and mandatory relief be given to charities alone, with a discretion in local authorities to relieve the rates of near-charitable organisations. "We can see no justification in principle for redefining the term 'charity' for rating purposes only. If charity is to be given some new statutory meaning, the new definition should apply equally for all purposes." The present definition is fraught with illogical subtleties, but at least rating relief is brought into line with the general law. To have a modified section 8 coexisting with the Recreational Charities Act definition must deepen the confusion and add to litigation. With this recommendation the anomalies of rate relief are the anomalies of charity generally; does this mean that organisations like the West Ham Boys' and Amateur Boxing Club will be thrown back upon discretionary relief? At quarter sessions in 1957 counsel conceded the club not to be charitable.[4] Or is the club now saved by the Recreational Charities Act, which, incidentally, was merely intended to confirm the law? One will also watch with interest for the N.A.L.G.O. Benevolent and Orphan Fund which secured relief under section 8.[5]

With regard to the field within which discretionary relief may operate, it is not without interest that the Committee speaks of widening the existing section 8 (1) (*c*) so as to include indoor sports and clubs making charges. Does this imply that in the Committee's view playing fields, now given mandatory relief by

[4] *Trustees of West Ham Boys' and Amateur Boxing Club* v. *West Ham C. B. C.* (1957) 50 R. & I.T. 413.

[5] *N.A.L.G.O. Association* v. *Bournemouth C. B. C.* (1957) 50 R. & I.T. 487. See further, Waters, "Social Welfare," (1959) 23 Conv.(N.S.) 365.

section 8 (1) (*c*), will in future revert to pre-1956 discretionary relief?[6] It was no doubt to avoid the confused charity law concerning sport that section 8 (1) (*c*) was originally inserted in the 1955 Act; the Pritchard recommendation will directly raise the issue of the scope of the Recreational Charities Act.

Fifty per cent. mandatory relief is suggested as a compromise between varying previous practice and enjoyment of local services, and in view of the small sums involved and the difficulties of distinction between organisations the Committee recommends no separate treatment for national organisations or those receiving Exchequer assistance. Nor is any exception thought fit in the case of university property, although four local authorities are relatively hard hit by the suggested 50 per cent. relief.[7] It is doubtful however whether the last word has been said on this matter; the future may see a new method of valuation of university property, which would displace the Committee's recommendations. In the same way it is unlikely that, having recently steered through the legislature an added assistance scheme for denominational schools, the Government will be enthusiastic to impose a 50 per cent. rating liability upon voluntary schools. Since the universities and schools together constitute about 42 per cent. of the rateable values considered by the Committee, these reflections seem significant.

Two further points warrant mention. The suggestion that the compulsory registration of charities be extended to all charitable rateable property is most welcome, particularly if it means that litigation concerning qualification for mandatory relief will be conducted solely in the High Court. In appeals against the rate or in actions on distress warrants quarter sessions are not equipped to deal with the subtleties of the charity definition, and it merely adds costs when appeals to the High Court are almost automatically taken. Secondly, the Committee follows the Sorn Committee in recommending the repeal of the Scientific Societies Act, 1843. Over 90 per cent. of the qualifying organisations are charitable, and nowadays, as the *London Library* case shows, the line between the qualifying and the non-qualifying is no longer justifiable. Little exception could be taken to this recommendation.

The Pritchard recommendations may not necessarily overlap with other Government proposals concerning charitable trusts, and therefore should be capable of early enactment. But there will

[6] And, if a local authority interprets the formula, within which it may confer discretionary relief, against an organisation, the organisation is not likely to test the interpretation in the courts. Does this mean further concealed anomalies between local authority areas?

[7] Oxford City Council Finance Committee claims that, taking all possible university rate relief and rerating into account, "the total [added] cost to ratepayers [will] be nearly 4s. in the £": *The Times*, September 22, 1959. Oxford City does not qualify for a rate-deficiency grant.

undoubtedly be considerable opposition to enactment from some local government quarters, though the report has been generally well received.[8]

D. W. M. Waters.

[8] One paper delivered at the 1959 annual rating conference carries an addendum describing the Pritchard Committee report as inducing a feeling "of profound regret and indeed consternation that there appears to be in the minds of the Committee this lingering lack of faith in local authorities." See further (1959) 52 R. & I.T. 675, at p. 676. This criticism is surely misplaced.

NOTES OF CASES

Habeas Corpus and Protection

Cases of great constitutional importance do not often come before the courts nowadays: the decision of the Court of Appeal in *Ex p. Mwenya* [1] is undoubtedly one such exception. And since the case concerned the English courts' jurisdiction to grant the writ of habeas corpus to a person residing in a protectorate (in this case, Northern Rhodesia) the decision, in the light of the tense political situation in the Federation of Rhodesia and Nyasaland, cannot have been more timely in its judicial and political significance.

That much said, it is unfortunate that the decision is so limited in its terms. No criticism can be levelled at the court for this state of affairs; the court was circumscribed in its handling of the case by the insistence of the Attorney-General to argue the case on a series of hypotheses by way of a preliminary issue. The Master of the Rolls, Lord Evershed, expressed himself as unhappy about the consequences of dealing with the case on this footing; he might have added that it is doubtful whether an application for habeas corpus can ever be treated in watertight compartments. There was, moreover, one point decided before the Divisional Court which the Court of Appeal did not deal with; this concerned the application as against the Colonial Secretary who, the Divisional Court held, did not have such control over the detention of Mwenya as would justify an order being made against him.

The applicant, Andrew Mwenya, a native of Northern Rhodesia, had been restricted to an area of approximately 1500 square miles of the Mporokoso district following disturbances on the protectorate's Copper Belt in November 1956. He had successfully applied to the High Court in Lusaka in June 1957 for a writ of habeas corpus; but a new restriction order was made against Mwenya who then sought to challenge it in the English courts. The restriction orders were made under a series of Emergency Powers Regulations which in turn derived their authority from the Emergency Powers Order in Council, 1939. The applicant's contention was that this Imperial Order in Council did not comply with section 1 (1) of the Rules Publication Act, 1893 (repealed by the Statutory Instruments Act, 1946), in that a notice of intention to make such an order had not (as required) been published in the *London Gazette* at least forty days before the Order was made. The invalidity of the 1939 Order in Council would have led to the invalidity of all the emergency powers of the Governor of Northern Rhodesia.

[1] [1959] 3 W.L.R. 767; [1959] 3 All E.R. 525.

The Divisional Court on May 12, 1959, gave *ex parte* leave for the notice of the application to be served upon the Secretary of State for the Colonies, the Governor of Northern Rhodesia and the District Commissioner of the Mporokoso district. On the hearing before Lord Parker C.J., Slade and Winn JJ., the Attorney-General took the two preliminary points mentioned above. At the conclusion of the argument the court upheld the contention of the Attorney-General on both issues and delivered its judgment a fortnight later.

The Divisional Court held that the Colonial Secretary was not a custodian for the purposes of the writ of habeas corpus. Although this point was made a ground of appeal, the Court of Appeal preferred to leave this matter over for a possible later stage of the case. But in the event, the case was dropped on the Governor announcing to the Court of Appeal that Mwenya had some days earlier been freed from the restriction order. The decision of the Divisional Court on this point therefore stands. Since the Divisional Court was reversed on the issue whether the writ ran into the protectorate it is convenient to deal with the application as against the Colonial Secretary here.

The omission of the Court of Appeal to deal with this point may have serious consequences since the Divisional Court's cavalier treatment of the issue may tend to obscure the crucial feature of the writ of habeas corpus. A habeas corpus application, once a prima facie case has been made out, demands that the gaoler should come before the court to justify the imprisonment. It is the respondent who must justify the failure to produce the body before the court.

The modern procedure whereby the argument before the court is conducted without the respondent having to bring the body before the court is obviously convenient. But it cannot remove the fundamental duty upon the respondent to justify the imprisonment. The Divisional Court was prepared to decide the issue on the basis of the Colonial Secretary's affidavit. It did not go further and inquire whether the Colonial Secretary could in practice order the applicant's release. Can anybody doubt that ultimately Her Majesty's Colonial Secretary had the power to command the Governor to release Mwenya?

That part of the Colonial Secretary's affidavit which is relevant reads as follows:

> "Save in the sense that I am not prepared to advise Her Majesty to approve the policy of instructing His Excellency the Governor to revoke the restriction order made by His Excellency in regard to Andrew Mwenya or any Order in Council or Ordinance empowering His Excellency the Governor to make such orders, I have not detained Andrew Mwenya or ordered him to remain in any area, nor do I detain him nor is he ordered by me to remain in any area, and I have not and have not had the custody of Andrew Mwenya."

Lord Parker C.J. delivering the court's judgment held that, even though the Colonial Secretary can advise and attempt to persuade Her Majesty to cause the body to be brought up, it does not mean that he has such control as will enable the writ to issue. This unrealistic, but perhaps theoretically correct, view of the Colonial Secretary's powers over those living in a protectorate is vital; it is a pity that the Court of Appeal could not review the reasoning of the Divisional Court since the point contains the essence of the nature of the " protection " Westminster provides those in Northern Rhodesia. Certainly Vaughan Williams and Farwell L.JJ. in *R.* v. *Crewe, ex p. Sekgome* [2] in the Court of Appeal seemed to think that a Secretary of State could be a custodian. But the Divisional Court preferred the contrary view of Kennedy L.J.[3] which was followed by Cassels J. in *Re Ning Yi-Ching*.[4]

It was the conflicting dicta of the Court of Appeal in the *Sekgome* case that led to the argument whether a writ could issue out of London into a protectorate. The Divisional Court again preferred the view of Kennedy L.J. (which was elevated to a *ratio*) to that of Vaughan Williams L.J. (whose view was declared to be only *obiter dictum*); Farwell L.J. expressed no opinion on this aspect of the case.

But the Divisional Court did ultimately declare that the point had to be decided on first principles; it was its concept of what those first principles were that the Court of Appeal disagreed with. The principle which Lord Evershed M.R. disavowed was stated by Lord Parker:

> " The writ of habeas corpus is a prerogative writ, namely, as this court conceives it, a manifestation of the sovereignty of the Crown and an instrument by which that sovereignty is exercised. It follows that there can be no power to issue this writ which is not derived from, or which is more extensive than, such sovereignty."

As Romer L.J. put it, this argument of the Crown, adopted by the Divisional Court, is a syllogistic one: The writ of habeas corpus, runs the argument, will in no circumstances issue into a British protectorate: Northern Rhodesia is a British protectorate: therefore the writ will not issue into Northern Rhodesia. There is no difficulty with regard to the second stage of this syllogism for it is established by the terms of the Colonial Secretary's affidavit. What the Court of Appeal did—which the Crown argued was not for them to do—was to ascertain the nature and extent of the control which the Crown and Parliament have imposed on the protectorate.

All three members of the Court of Appeal were in fact not prepared to treat the matter of a prerogative writ as inextricably bound up with complete and indivisible sovereignty. Lord Evershed

[2] [1910] 2 K.B. 576, at pp. 592 and 618.
[3] *Ibid.*, at p. 629.
[4] (1939) 56 T.L.R. 3, at p. 6.

brushed aside the strict Austinian theory of sovereignty. He found that the internal governance of Northern Rhodesia is in legal effect indistinguishable from that of a British Colony or a country acquired by conquest. He based his reasoning on the writings of Bacon, Blackstone, Coke and Mansfield to the effect that the issue of the writ depended on the extent to which the particular territory was " under the subjection of the Crown " and not upon an adherence to the outmoded principles of sovereignty.

Sellers L.J., in a commendably robust judgment, said that he could not understand why the writ should be limited by territorial boundaries. He might have cited the curious result, if the Crown's argument were right, in relation to Kenya. Part of that territory is a protectorate where the Sultan of Zanzibar exercises sovereignty, the other part being a colony (see *Nyali, Ltd.* v. *Attorney-General*[5] in the Court of Appeal). Yet the whole territory is administered by the British Government as a single unit. It would be strange if a person in Mombasa had no right to the writ whereas his colleague in Nairobi could ask the English courts for it.

Since the Court of Appeal decided the preliminary issue in favour of the applicant there was no desire to go on and consider the effect of the Habeas Corpus Act, 1862, which provided the circumstances when a writ could be sought in London. The decision in *Sekgome's* case indeed bound the court in *Mwenya's* case to the ruling that a " protectorate " is not a " colony or foreign dominion " within the meaning of the Act. Section 1 of the Act provides that " no writ shall issue out of England, by authority of any judge or court of justice therein, into any colony or foreign dominion of the Crown where Her Majesty *has a lawfully established court, or courts of justice, having authority to grant and issue the said writ and to ensure the due execution thereof throughout such colony or dominion.*"[6]

The Court of Appeal was sensitive of the fact that Mwenya could have applied locally for his writ but in the event was not concerned to deny him the writ because the writ might effectively have issued out of the local courts. But what if the local court cannot grant the writ in precisely the same manner as an English court? As Sellers L.J. said:

> " There may come times in a country's history when it may appear highly inconvenient or politically hazardous that the law should pursue its course, but in a court of law such considerations are irrelevant and cannot serve to deprive a subject of a right which an English court could give and enforce."

The real value of the decision in *Mwenya* then is that the English courts' overriding power can operate as a reversionary right whenever the courts in a colony and, now, a protectorate cannot fulfil the

[5] [1956] 1 Q.B. 1.
[6] Italics added.

demands of this most effective weapon for the protection of the individual's freedom. This is no academic question. Northern Rhodesia's neighbour in the Central African Federation, Nyasaland (also a protectorate), does not have the writ but has what is called, in section 350 of the Criminal Code, a "direction in the nature of the writ of habeas corpus," which is only a discretionary remedy in the hands of the courts.[7] Other colonies and protectorates are in a similar position. It is thus vital that the residual power to grant the writ should reside in London. Not until these territories are granted independence and a constitution with the writ of habeas corpus entrenched in it should this control be severed. Whether any protectorate qualifies as being sufficiently subject to the British Crown to give the English courts jurisdiction to grant the writ will have to be determined on its own particular constitutional status. The Court of Appeal in *Ex p. Mwenya* has provided a telling reminder that the British legislature, through the medium of the courts, still exercises "protection" over those residing in some at least of the territories classified unscientifically as protectorates.

L. J. BLOM-COOPER.

EXTRATERRITORIAL COLONIAL LEGISLATION

Re Choo Jee Jeng,[1] decided by Ambrose J. in the High Court of Singapore, is an addition to the sparse authorities on the power of colonial legislatures to make laws with extraterritorial effect. It is also another case in the growing line of unhappy decisions abdicating the power of the judiciary to protect the liberty of persons not charged with criminal offences against a broadening executive discretion.

The applicant for habeas corpus in this case had been detained under the (Singapore) Preservation of Public Security Ordinance, 1955, section 3 (1) of which provides, in its original form:

> "If the Governor-in-Council is satisfied with respect to any person that, with a view to preventing that person from acting in any manner prejudicial to the security of Malaya or the maintenance of public order therein or the maintenance therein of essential services, it is necessary to do so, the Chief Secretary shall by order under his hand make an order directing that such person be detained for any period not exceeding two years."

An Appeal Tribunal (shortly to be replaced by an advisory committee) is established by section 6, and consists of two Supreme Court judges and a District Judge. Every person detained under this Ordinance has a right to appeal to the Appeal Tribunal against the detention

[7] See s. 330 of the Aden Criminal Procedure Code and s. 341 of the Brunei Criminal Code.

[1] (1959) 25 *Malayan Law Journal* 217.

order (s. 5 (1)), and the Tribunal, whose order is "final and shall not be called into question in any court" (s. 5 (4)), "may in its discretion revoke, amend or confirm an order or direction made by the Chief Secretary . . ." (s. 7). Choo Jee Jeng applied for habeas corpus without having exercised his right of appeal to the Appeal Tribunal, the centrepiece of his submissions being that the Ordinance was void for extraterritoriality.

The Singapore Legislative Assembly has, and had in 1955, power (subject to qualifications) to legislate "for the peace, order and good government" of Singapore. Section 3 of the Preservation of Public Security Ordinance, quoted in the preceding paragraph, refers to "the security of Malaya" and other considerations "therein." Since "Malaya" is defined in section 2 of the (Singapore) Interpretation and General Clauses Ordinance as meaning Singapore and the Federation of Malaya, a problem of extraterritoriality is presented.

Ambrose J. might have decided that the Preservation of Public Security Ordinance, being limited to the making of detention orders in respect of things done in Singapore, did not purport to have any extraterritorial operation. However, the learned judge held that the Ordinance was not so limited and that it did operate extraterritorially. He was apparently assisted in coming to this conclusion by the fact that a detention order made under the Preservation of Public Security Ordinance against a person in the Federation is enforceable there under Federation legislation, though (1) extradition legislation, if extraterritorial in operation, is well recognised as an exception to any general rule there may be against extraterritorial colonial legislation, and (2) it is difficult to see why legislation begins to operate "extraterritorially" simply because adopted by the legislature of another country.

Having decided that the Preservation of Public Security Ordinance had extraterritorial effect, Ambrose J. proceeded to consider *MacLeod* v. *Att.-Gen. for New South Wales*.[2] He came to the conclusion that the Privy Council were wrong in deciding that a New South Wales statute could not make punishable in that colony acts done abroad. Ambrose J. must have also come to the conclusion that this was not one of the grounds of the Privy Council decision or that Privy Council decisions from Australia are not binding in Malaya, or that the House of Lords was wrong in *Jacobs* v. *L. C. C.*[3] in its attitude to multi-grounded results. Possibly the Privy Council was wrong in *MacLeod's* case, but Ambrose J. pursued an unusual course by smiting the Board with Earl Jowitt's *Dictionary of English Law* (as to the "true meaning" of the maxim *extra territorium jus dicenti impune non paretur* allegedly relied on by the Privy Council in deciding against the validity of extraterritorial New South Wales legislation), Professor H. A. Smith

[2] [1891] A.C. 455.
[3] [1950] A.C. 361.

in the *Canadian Bar Review*,[4] and a Privy Council decision not cited to him—*Wallace Bros. & Co., Ltd.* v. *Commissioner of Income Tax, Bombay*.[5]

However, the attitude of the Privy Council in the *Wallace* case, that the extent of the powers of a legislature depends on the construction of the enabling Act and not on *a priori* rules, is the most attractive one. Ambrose J. then states the test of the validity of the Ordinance as being "whether section 3 (1) of the Preservation of Public Security Ordinance is for the peace, order and good government of the Colony, notwithstanding the fact that it may relate to persons, acts or things beyond the limits of the Colony." This being a question of fact, once the enabling words have been construed, Ambrose J. held the Ordinance valid. Legislation is not necessarily *ultra vires* a legislature having power to legislate for the peace, order and good government of a specified territory merely because it relates in some fashion to events or persons outside that territory.

Choo Jee Jeng failed to get habeas corpus on two further grounds. Ambrose J. rejected the submission that the reasons for the satisfaction of the Governor-in-Council could be inquired into. The last ground was that there was an alternative remedy by going before the Appeal Tribunal established by the Ordinance. This means that a person who thinks he is wrongly imprisoned must sit in detention and wait until a body having no concern with the validity of the original imprisonment orders his release. A bizarre novelty has been invented, and Lord Atkin must be turning in his grave.

If it is established that imprisonment is unlawful, habeas corpus must be granted. If the Governor-in-Council is not satisfied, the imprisonment is unlawful. If the Ordinance is void, the imprisonment is unlawful. If the Ordinance is valid, and the Governor is satisfied, the applicant, in order to secure his release by the Appeal Tribunal, does not have to show them that the imprisonment by the Chief Secretary was unlawful, but that there is no need to continue it. On the other hand, if the original imprisonment was unlawful because the Ordinance was void, there is no Appeal Tribunal. There is no parallel with convictions, because imprisonment under an erroneous conviction is lawful until that conviction is quashed. Never before has it been suggested that a person who can establish that there is no lawful authority for his imprisonment must be denied habeas corpus because at some later date some other adjudicating authority may decide to release him for some other reason.

L. A. SHERIDAN.

WATER-TUBE BOILERS: CONTRADICTIONS AND A PARADOX

THE Water-Tube Boilermakers' Association has the distinction of being the organiser of the first price maintenance scheme to have

[4] Vol. 1, pp. 339–340.

[5] (1948) A.I.R.; 1948 P.C. 118.

been judged to pass the public interest tests laid down in the Restrictive Trade Practices Act.[1] The very fact of its success goes some way in dispelling the fears, common in industry, that these tests, as interpreted by the Restrictive Practices Court, are extremely difficult to pass, fears which were aroused by the decisions in both the *Cotton Yarn Spinners* and *Blanket Manufacturers* cases.[2] The judgment is also important in that two of the seven paragraphs in the key section 21 have for the first time come up for judicial interpretation. It is particularly regrettable, therefore, that the judgment, which breaks new ground, does not delve more deeply, for general guidance, into some of the issues before the court. Moreover, it is suggested, with respect, that some inconsistences have found their way into the judgment; and that the main economic conclusion (on the effects of the restriction on exports) is not convincing.

The Association includes the six principal United Kingdom firms making land water-tube boilers; there are also two United Kingdom independents. The major part of the output of the industry consists of giant boilers for central electricity power stations, of which since 1948 the nationalised electricity supply industry has been the sole United Kingdom buyer. "Industrial boilers" make up the rest of the output. The export trade is a substantial part of the industry's activities. The court emphasised also the following features of the industry: the size of individual orders for boilers is large and growing; scientific and technical knowledge and research are important; technological development and change are rapid; the firms are efficient and financially strong with world-wide reputations; and firms require "a relatively larger highly skilled staff than is common in industry generally," which involves "high overhead costs, a large proportion of which represents cash outgoings" (p. 329).

The court found that the industry was in a recession and had been in recession for the past two years. "There are too few orders both at home and overseas, leaving a substantial capacity in the industry unfilled" (p. 328). (By "capacity" in this industry is meant key scientific and technical personnel.) The court regarded it as their duty, in terms of section 21 of the Act, "to consider likely future conditions," and discharged this duty "though with reluctance," apparently because "it is always speculative to forecast the future of any industry" (p. 328). Their forecast was that the recession would continue until the mid-1960s, with some deterioration but without a deep depression. By 1970 the upturn would probably cause demand to exceed existing capacity. Their important conclusion was that "in view of the expected long-term expansion in demand . . . it would not be in the national interest that any of these member companies should be forced by

[1] *Re Water-Tube Boilermakers' Agreement* (1959) L.R. 1 R.P. 285.
[2] (1959) L.R. 1 R.P. 118; L.R. 1 R.P. 208.

economic pressure to give up boiler production " (p. 329). In the context and from other statements it is clear that it was the maintenance of existing capacity over the period of the recession that was in the national interest, and not, for example, the avoidance of a higher degree of concentration in supply.

The proceedings before the court were concerned only with the Association's main restriction, its Rule 5. This is a collective pricing arrangement which has operated since February 1957, at which date it replaced other restrictive tendering arrangements. It covers some, but not all, inquiries from customers both in the United Kingdom as well as in certain export markets, mostly in the British Commonwealth (excluding Canada). When applicable, the scheme works as follows. The individual firms' tenders on a project are sent to the director of the Association. The members meet before the tenders are sent to the customer. First it is decided which member-firm is to be the " selected " member. In the home trade this is decided normally on the basis of the " record of trading." Broadly, that member is " selected " who has done relatively least business in the home trade during the previous five years as measured against the relative performance in the years 1947–56. " The object is to spread the work having regard to the needs of members to secure a contract " (p. 331). This is less important in the export trade, where " customer preference " is more influential than the record of trading in the area; customer preference refers to that member whom it is believed would be preferred by the particular customer. The various tenders are then examined and evaluated, after which the selected member may adjust his tender price to that of the most favourable tender. The other members may not alter their tenders. The customer then receives the tenders in the ordinary way.

How does this scheme affect prices? The Association argued that without such a scheme " prices would fall to a wholly uneconomic level " in times of slack demand, and the court agreed that " there would be a severe cut in prices " (p. 335).[3] It is nowhere explained in the judgment how this price-supporting effect is achieved by the scheme; but an explanation can be provided. The members who do not expect to be the selected member for a job will have less incentive than otherwise to submit the keenest possible tender, because the lowest initial tender does not necessarily secure the order for the tenderer as the selected member may elect to match it. The member expecting to be the selected member is also likely to act with restraint in his initial offer because he is given a second

[3] The court's conclusion quoted in the text, above, is apparently unconditional and unqualified; it applies, it seems, to both the home and export trades. Yet towards the end of the judgment in a similar observation the verb " may " takes the place of " would " (p. 346), an unexplained and unresolved change in emphasis.

bite at the cherry, the opportunity to adjust his price to meet inter-member competition. This restraint on members is likely to be more effective in the home market where selection is normally based on past trading results; the scheme here has definite market-sharing characteristics designed as far as possible to secure over the years for each member an agreed share of the group's aggregate business. (The court criticised the rigidity of the arrangements in the home market.) Any member whose price is too high on a job is automatically placed in a better position to get one of the succeeding orders because his trading record will deteriorate as against that of the successful tenderer.[4] This particular restraint is likely to be less effective in the export markets, where selection is, as has been noted, on a different and perhaps less objective basis; in any case, more intense outside competition in foreign markets is likely to limit the effectiveness of price-maintaining efforts.

The court was satisfied that, despite its price maintaining effects, the tender prices under the scheme "are really competitive and keen prices, by which we mean prices which cover overheads and depreciation and allow a small, but only very reasonable, margin of profit" (p. 334).[5]

The Association sought to establish that the scheme in the home market satisfied paragraphs (*b*) and (*d*) of section 21 (1) of the Act. Under paragraph (*b*) it was claimed, *inter alia*, that the scheme, by maintaining prices in slack periods, preserved capacity which would be required when demand recovered in due course; and that this was a specific and substantial benefit to customers. This argument—as well as a related argument pertaining to research activity—was rejected. The court held that, without the scheme, the six firms would remain in business and maintain their existing capacity over the period of the recession.[6] This conclusion,

[4] The court seem to have drawn a different conclusion: "Each time he [a member] fails to secure an order he knows that his record of trading will give him a better chance of becoming the selected member next time; his quoted prices will become even keener . . ." (p. 336; see also p. 343). If members reacted in this way, their bids becoming keener as their need for business became greater, it is difficult to see how the scheme could achieve its object of maintaining prices.

[5] When discussing the level of prices and profits under the scheme, the court made the point that the members had been successful in securing orders and hence that their prices compared favourably with those of outside competitors. There is no mention in the judgment, however, of the fact that foreign imports into the U.K. are subject to an appreciable *ad valorem* duty, and that in some of the relevant Commonwealth countries British imports enjoy a measure of preference. Clearly, all price-maintaining arrangements have to take account of outside competition. The relevant issue is the degree of latitude within which prices can be successfully controlled by restrictive agreements. This depends, for example, on tariff protection and on the strength of independent competition. This issue is not, however, discussed in the judgment.

[6] "All of the members are strong long-established boiler-makers and there is no evidence to show they lack the resources to keep in business during the contemplated recession. The directors realise perfectly well that if they are to remain in the business, they must retain these [key] personnel; they will do so" (p. 337).

though interesting for its rejection of a common claim for restrictive agreements in industries affected by fluctuations in demand, would not call for special comment were it not that two later passages in the judgment make sense only on the opposite premise that, without the scheme, some firms would (or might) be forced out of the boiler business and that in consequence existing capacity would not be preserved—consequences which the court considered to be against the "national interest."[7] The contradiction is nowhere resolved.

The claim under paragraph (*d*) was to the effect that the scheme was "reasonably necessary" to "enable" members of the Association to "negotiate fair terms" in the orders for the nationalised electricity industry, which "controls a preponderant part of the trade or business of acquiring" boilers. (In the period 1952–58 the nationalised industry was responsible for 83 per cent. of the home business of the members of the Association, and for 56 per cent. of their total home and export business.) Here the court held that this large buyer was preponderant and that, without the scheme, the members would not be enabled to negotiate fair terms, defined by the court as "terms upon which the efficient manufacturer can make and sell his goods at a reasonable, but no more than a reasonable, profit" (p. 341). (The basis of the implied profit calculation is not specified.) This finding was based not on the presumption that the preponderant buyer would use its weight in the market to force prices down to an "uneconomic" level, but on the court's general view that, in times of slack demand, the firms would quote "uneconomic" prices to secure important, large and sporadically occurring orders. The finding, however, that "the conditions for the operation of the paragraph (*d*) are satisfied" was made dependent on the "special circumstances of this case." These circumstances, it then appears, concern the national interest in maintaining the six members in business over the recession "having regard to the expected long-term demand."[8] The relevance of this is puzzling, because it will be recalled that the court had stated earlier that even without the agreement the firms and their capacity would remain in the industry. Moreover, even if the court's finding on this issue had been different, the relevance of this sort of consideration in applying the test in paragraph (*d*) is not apparent. Are prices to be considered "fair" only when

[7] See p. 87, and note 14 below.

[8] The court stated: "In the case before us, however, there is no room for the free play of competition in the ordinary sense. Here we have six big and efficient firms who ought in the national interest, having regard to the expected long-term demand, to stay in the business. In the meantime there are these very few, very large, orders which it is expedient should to some extent be spread over the industry and not concentrated in the hands of very few." The court stated that in other situations the "normal results of competition will come into play" (elimination of the less by the more efficient), and such situations "will not usually give rise to the necessary conditions for the operation of the paragraph" (p. 341).

they contribute towards results deemed to be in the "national" interest?

Though the conditions for the operation of paragraph (*d*) were found to be satisfied, the court decided that the particular restriction was not "reasonably necessary" for the negotiation of fair terms with the preponderant buyer; for this purpose it was "quite unnecessarily wide" for the "simple reason" that it covered other home customers as well as foreign customers in a number of overseas territories. Though in the present case this did not affect the final outcome, paragraph (*d*) has certainly been interpreted strictly on this point. In particular, since the arrangements affecting foreign customers were in fact found to be in the public interest in terms of paragraph (*f*) of section 21 (1) (*infra*), it is difficult to appreciate why the inclusion of the export trade within the scope of the arrangements was held to help to disqualify a successful defence under paragraph (*d*).

The interpretation of paragraph (*d*) raises another important question. Generally, two types of situation can be distinguished in which sellers in an industry may be unable to obtain "fair terms" (on the court's definition) from a preponderant buyer. The first is where the preponderant buyer, by virtue of the exercise of his bargaining strength, or merely because of his position in the market, is able to obtain from sellers price (or other) concessions which these sellers do not make to other buyers. A restriction, operated selectively by the sellers in their dealings with the preponderant buyer, may then serve to secure "fair terms" from him, and so neutralise his particular bargaining position *vis-à-vis* them individually. The second situation is where the sellers offer terms, "unfair" to themselves, to the preponderant buyer as well as to the other buyers, inadequacy of total demand relatively to capacity, for example, setting the stage for their sacrifice. It is clear from the judgment that the court, in the present case, believed that the second type of situation was likely to apply in a buyers' market for water-tube boilers, the conditions with which the discussion was concerned.[9] Hence the court's attitude would seem to amount to condonation of restrictive arrangements discriminating against a preponderant buyer and leaving the sellers in a weak market unable to obtain "fair terms" from the other buyers. Was it the intention of Parliament (or of the court) to permit the dice to be loaded against the preponderant buyer? And would the court's decision have been different if, unlike in the present

[9] It should be noted, however, that the court seemed to imply that in all circumstances sellers might be particularly anxious to secure orders from the U.K. Electricity Authority because of the value of such contracts in securing overseas business (p. 339). The main discussion, however, ignored this consideration, the relevance of which in any case is not obvious, since any price reduction made to obtain these orders would be premised on expectations of offsetting advantages in export orders.

case, on the selling side the preponderant buyer was engaged in competition with the other buyers?

The judgment then turns to paragraph (*f*), referring to exports. Here the court concluded that the abrogation of the scheme, "operated in the way that it is in relation to overseas orders," would be likely to cause a substantial reduction in the volume of earnings of the export business of the boiler industry; and the Association's claim was admitted. Before looking at the economics of the matter, a point of interpretation is of interest. Does the wording of paragraph (*f*) mean that the test requires *some* reduction in export volume or value, which volume or value is substantial in relation to the output of the industry (or, alternatively, but without relevance in this case, to the total of all United Kingdom exports)? Or does it mean that it is necessary that the reduction itself would be substantial in relation to the output of the industry? The court declared that, though the first interpretation was suggested by the "strict grammar" of the paragraph, it was not in their view the correct construction. The further exposition of this argument leads the court to a strange conclusion. The court stated of a hypothetical case that "the export business may be quite small . . . compared to the total volume or earnings of the business both at home and abroad; nevertheless it may in absolute terms be valuable and if the reduction is expected to be substantial, then it seems to us that the paragraph is intended to operate" (p. 344). This makes no sense, however, unless "quite small" unexpectedly means "substantial." A certain quantity (the reduction in exports), which cannot be greater than a second quantity (present exports) which itself is quite small (not substantial) relatively to a third quantity (total output), cannot be substantial relatively to that same third quantity. Yet the court's discussion implies the opposite. For, whatever its ambiguity, paragraph (*f*) clearly states that substantiality (whether of exports or of the reduction in exports) must be measured relatively to the industry's total output. However, this difficulty does not affect the decision in the present case, because the court found that both the export trade and the expected reduction were "substantial."

The economics of the court's argument is complicated. The court recognised that it would seem paradoxical to claim that a scheme which admittedly "would" (or "may") raise prices would nevertheless secure more and not fewer export orders. Nevertheless the court took this line. One wonders whether the court considered one other implication of its finding. More orders from foreign customers could be secured only if they found that the restrictive arrangements promoted their interests as buyers. It is surely doubtful whether foreign customers would share the court's implicit view on this point.

Three strands in the court's analysis may be separated. First, the court was satisfied that in connection with export orders there

was " a much greater exchange of technical knowledge and ' know-how ' than in the case of home orders " (p. 342), and that this was " of great, and perhaps even of crucial, value in dealing with inquiries from abroad " (p. 343). But it is not considered in the judgment whether such exchange of information would not continue even if the collusive pricing part of the scheme were abrogated. If such non-restrictive collaboration paid dividends in the form of additional export business, why should its continuation be jeopardised by the abandonment of the restriction; particularly if, as the court stressed, the members of the Association had as their principal object " to bring the order home to this country " (p. 342).

The second strand in the analysis concerns the " selection " of a member which, in the export trade, takes place largely on the basis of " customer preference." The crux of the matter, which is not clearly stated in the judgment, may be put in this way. Without the scheme, a foreign competitor's tender may be more attractive to the customer than any of those submitted independently by the six members. But if the " selected " member—the one of the six " favoured " by the customer—had the opportunity of seeing the other five tenders and of reducing his bid to the level of the lowest, his revised tender might win the order for the United Kingdom, combining as it would this lowest price with the added attraction of its coming from the preferred supplier. In short, a price quoted by a non-preferred member may be less attractive than the best foreign bid, while the equivalent price quoted by the preferred member might make the grade. This possibility cannot, in principle, be ruled out.[10] But its likelihood and frequency must be considered in the light of the circumstances that all six members are world-renowned, that the customer chooses the firms which are to tender, and that the scheme, if anything, takes some of the edge off the keenness of the members' price-quoting. It would require the frequent occurrence of a special combination of circumstances for a *substantial* volume of orders to be affected.[11]

The third strand carries even less conviction than the second. Some of the members maintain offices and personnel in overseas countries. " . . . If the restriction were to be removed, there would

[10] But in the absence of the scheme, could not the customer, after having received competitive tenders, ask his preferred supplier whether he was prepared to meet the most acceptable tender?

[11] The restrictions came into operation in February 1957. Up to the end of 1958, the pricing procedure had been applied to only 83 inquiries out of a total of over 1,000 received by members of the Association from domestic or foreign sources. Of these 83, 51 had resulted, at the time of the proceedings, in orders being placed, 37 with members. 30 of the 51 orders were export orders, and 23 of these came to members (total value £14·6m.). In four of these 23 cases (value £1·8m.) the order went to a selected member who had reduced his price. This total should be seen in relation to the average annual (1952–58) value of orders received by the U.K. industry of £49m., including export orders of £16m. (Of course, it does not follow that the four orders would have been lost in the absence of the scheme; a reputable firm had in each case put in an identical offer to that accepted by the customer, and tendering would almost certainly have been keener without the scheme.)

be a likelihood at any rate of some of these offices being closed and extremely valuable local contacts lost, with consequential loss of orders " (p. 343). That extremely valuable local contacts—valuable assets to the firms in question—would be surrendered if the scheme went (and, therefore, when local contacts might be thought to become more rather than less important), bespeaks odd behaviour on the part of the firms, behaviour quite at variance with that earlier attributed to them in connection with the maintenance of capacity and research activity. The only explanation given is unimpressive; it is that the scheme gives the members " that extra confidence which makes it worth while to keep these expensive organisations overseas in being." [12]

Taking together all three strands in the argument, and on the information given in the judgment, it is submitted that the removal of the scheme would not be likely to reduce the export trade, let alone reduce it substantially.[13]

The judgment concludes with a consideration of the detriments in the balancing provision of section 21 (1). " In our judgment, the real detriment to be weighed against the reduction in exports is that the purchasers of boilers may have to pay rather more than they would otherwise do for their boilers." [14] But this detriment was held to be outweighed by the maintenance of exports.

[12] For the Association it was argued that, because the scheme maintained prices at home, members were assisted in " subsidising " their establishments overseas (p. 319). The court did not, it seems, refer to this argument.

[13] The judgment does not refer to two ways in which collective restrictive pricing arrangements may possibly increase the volume and/or value of exports in certain circumstances. The first method is for the sellers to prevent price competition among themselves and so to raise prices on export orders nearer the level at which they would be lost to outside competitors. (This would run the risk that some orders would be lost; but, in propitious circumstances, such losses need not offset the increase in revenue on the orders obtained.) This possible interpretation of the boilermakers' scheme is, however, incompatible with the court's finding that the scheme *increases* the number of export orders. The second method is for the sellers to use part of the greater profits secured (by the restriction) on business in the home market to reduce prices on export business; this subsidisation of exports could lead to a larger volume of exports with possibly a larger total of export earnings. This possible interpretation of the boilermakers' scheme is incompatible with the court's finding that export prices " would " (or " may ") be lower without the scheme.

Both of the above methods seem to be implied in some of the arguments advanced on behalf of the Association (*e.g.*, at p. 319).

[14] For the Registrar it was also argued (pp. 345–346) that the scheme (i) moderated " the free play of competition between firms of differing efficiency " and (ii) involved " an uneconomical use of the nation's productive resources " (the latter a consideration of great importance in the *Yarn Spinners* case). The court rejected the submission on the first point by referring back to its earlier discussion where it concluded that there " is no room for the free play of competition in the ordinary sense," as it was in the national interest that the six firms should remain in the business (see note 8, above). The submission on the second point was rejected by referring back to an earlier statement (presumably at p. 337) that " with or without the scheme there will be no reduction of capacity in the industry." The earlier statement of p. 337 referred to the maintenance both of *firms* and of *capacity*. So the court seems to have contradicted itself in successive sentences.

Thus the pricing arrangements, applying to both home and export business, were found to be not against the public interest solely on the strength of the paradoxical finding that a price-maintenance scheme operating in certain export markets substantially increases the number of export orders. A final question poses itself. Could the pricing arrangements have been adjudicated in two parts, leading to the conclusion that they should be terminated in the home market whilst being allowed to continue in operation in export markets? The answer would seem to depend on whether the relevant Rule 5 of the Association constitutes a single restriction within the meaning of the Act or whether it could have been interpreted as two separate restrictions, one operating in the home market and the other in respect of exports. Certainly, the continuation of the agreement in respect of exports need not in practice be affected by their termination in the home market; there appears to be no inseparable element of interrelationship in the operation of the two branches of the scheme, except in their common purpose. The judgment, however does not go into this question.

B. S. Yamey.

Resale Price Maintenance—"Resale"

Section 25 of the Restrictive Trade Practices Act, 1956, provides that a condition "as to the price at which goods may be resold" may be enforced against non-signers acquiring the goods with notice of the condition. In *Beecham Foods, Ltd.* v. *North Supplies (Edmonton), Ltd.*,[1] Vaisey J. had to decide whether the bottle in which the soft drink "Lucozade" was contained, and on which a refundable deposit had been paid, was itself sold within the section. The plaintiffs manufactured "Lucozade" and supplied bottles of it, always subject to a condition as to the observance of the fixed retail price published in the price list issued by their distributors. This stated that the retail price of "Lucozade" was 2s. 6d. plus 3d.; and under the heading "Bottle and container charges," it was stated that "Lucozade" bottles were "charged at 3s. per dozen refundable."

The defendants, who were cut-price grocers, knew of this condition, but retailed a bottle of "Lucozade" for 2s. 7d. The bottle bore a label with 2s. 6d. in large type followed by the words, "plus 3d. deposit returnable on bottle with stopper." In this action for an injunction to prevent the defendants from selling in breach of the condition, the only issue was whether this amounted to breach of a condition enforceable under section 25. Vaisey J. held that the bottle was not sold, but only hired and so did not come within it: he analysed the transaction into 2s. 6d. paid for the purchase of the liquid and 1d. for the hire of the bottle. He came to this

[1] (1959) L.R. 1 R.P. 262.

conclusion partly because of the word "Lucozade" moulded on the bottle which would prevent its being used to store other soft drinks without giving rise to a passing-off claim. The learned judge agreed with the statement in the distributors' price list that, as regards "Lucozade" bottles "Actual ownership of these . . . bottles does not pass to our customers, although a charge for them is made." This however, could not affect a purchaser, who would not have notice of the contents of the price list, so a retailer would have apparent authority to sell the bottles if this was otherwise the proper analysis of the transaction.

It is submitted that any housewife given to juridical analysis would think that she was buying the bottle with an option to resell it to the manufacturers for 3d. at the shop from which she bought it, or possibly, at any other where "Lucozade" is sold, the retailers being agents for the manufacturers.[2] Nowadays limitations on ownership are commonplace and there remain many uses to which such a bottle might lawfully be put: storing paraffin in it[3] for instance would not give rise to a passing-off claim. The housewife might be surprised to learn that she was under a duty to take care of the bottle and return it in due course. She might well think that her loss was limited to the 3d. deposit.[4] Vaisey J. mentioned some of these difficulties, but considered them irrelevant. However, to hold that the transaction is hire for purposes of section 25, but not for others, would, it is submitted, give rise to unnecessary complications.[5] In several passing-off cases, it has been assumed that the bottle in which the mineral or soda water was contained was itself sold.[6]

Another difficulty that arises on Vaisey J.'s analysis is that the housewife may think that she is entitled to 3d. on returning the bottle. If, to maintain his goodwill, the retailer gives her that sum, is this a gift of 2d. and outside the Act, or is it after all a deferred discount,[7] given on the sale of the liquid? A type of hiring, under

2 Vaisey J. observed, at p. 265, that it was not stated on the label where the bottle should be returned.

3 It would be a crime to sell any petrol product in it, or to keep paraffin in it without a label, under the Petroleum (Consolidation) Act, 1928, s. 5.

4 The judge thought that 3d. for the bottle was rather expensive, so the argument is academic. But nominal damages for conversion would be at least 1s.

5 Lawyers are used to relative concepts for different purposes, but it is submitted that concepts should be proliferated only if some useful purpose is thereby served.

6 *e.g.*, *Welch* v. *Knott* (1857) 4 K. & J. 747, at 753 (Page Wood V.-C.); *Wooley & Son* v. *Morrison* (1904) 21 R.P.C. 349 (Court of Session, Inner House) and *Thwaites* v. *M'Evilly*, *ibid.*, p. 397 (C.A.Ireland). In each of these cases it was assumed *obiter* that the bottle was also sold. In *Geddling* v. *Marsh* [1920] 1 K.B. 668, it was again unnecessary to decide whether the bottle was itself sold, as it was "supplied under a contract of sale" within the Sale of Goods Act, 1893, s. 14.

7 Under s. 26 (1) a condition as to the amount of discount that may be allowed on resale is to be treated as a condition as to the price at which those goods may be resold. The trader could therefore be sued under a suitably worded condition.

which the bailee can, on returning the object hired, get three times what he paid is absurd, except as an inducement to purchase the liquid. Retailers charging only 2s. 7d. for the bottle of liquid should therefore be advised not to pay more than 1d. for the bottle, but they could advise their customers to return it to a shop selling at the full price of 2s. 9d. Suppliers wanting to maintain that price should therefore make it plain, to both retailers and customers, that the 3d. is refundable only at the shop from which the liquid was originally bought.

V. L. Korah.

Trade Unions—The Political Levy—Conspiracy

Issues fundamental to trade unions were raised in the recent case of *Waterside Workers Federation* v. *Hursey* [1] decided by the High Court of Australia on appeal from the Supreme Court of Tasmania. Plaintiffs were members of the Hobart Branch of the Waterside Workers Federation, a trade union enjoying a virtual monopoly of stevedoring work in Australian ports. By virtue of their membership of the Hobart Branch plaintiffs were also members of the Federation. They were members of a breakaway political group, the Anti-Communist Labour Party (later becoming the Democratic Labour Party), which cherished strong anti-Communist sentiments and between which and the official Labour Party there existed considerable bitterness.

At a meeting on October 2, 1956, the Hobart Branch resolved to strike a levy of 10s. per head to assist the Australian (*i.e.*, official) Labour Party in an election campaign for the Tasmanian Lower House. (Plaintiff F. J. Hursey had previously announced that he intended to stand as an Anti-Communist Labour Party candidate at this election.) The plaintiffs refused to pay this levy and after a series of negotiations during the year 1957, the branch officials in 1958 claimed that as a result of the operation of certain union rules the plaintiffs had ceased to be members of the union. The Stevedoring Industry Authority, to which is committed, by the Stevedoring Industry Act, 1956, a Federal statute, the function of the allocation of waterfront labour to ships by means of a registration and roster system, took the view that it was still bound to roster the plaintiffs for duty. A concerted plan to prevent the plaintiffs from working was put into operation in 1958 by branch officials and members. The technique, which was called "picketing" though it went further than what is commonly understood by that word, consisted in the formation of a human barrier at the wharf which prevented the plaintiffs from getting through to answer their call to work. The result was that they were unable

[1] 1958 and 1959, as yet unreported. The present note is based on the official transcripts of the judgments.

to answer their names and were replaced by the employer with other labour. This occurred on a number of occasions. The plaintiffs sometimes tried to force their way through and on such occasions they were pushed and jostled and on all occasions they were subjected to considerable abuse. An interlocutory injunction was obtained which put an end to these tactics but the union secured equal success with the plan of rendering each gang to which the plaintiffs were assigned unworkable by arranging that the key man in the gang walk off as soon as the plaintiffs started work. The plaintiffs commenced proceedings in the Supreme Court of Tasmania against the branch, the Federation and certain officials in which substantially they asked for declarations that the levy was *ultra vires* and that they remained union members, for appropriate injunctions and for damages for conspiracy and other alleged causes of action in tort.

It should be mentioned at this point that all the Australian states possess Trade Union Acts modelled on the United Kingdom Act of 1871. That in Tasmania, like the United Kingdom Act, made no reference to payments for political purposes. Of more practical significance in Australia, however, is the system of registration of unions under the various Industrial Arbitration Acts by which they attain the right to represent employees in proceedings before the compulsory arbitration tribunals and gain other advantages. Such systems exist in all states save Victoria and Tasmania. A similar process of registration of " organisations " under the Commonwealth Conciliation and Arbitration Act is necessary to enable unions to participate in the processes of the Commonwealth Arbitration Tribunal.

The Waterside Workers Federation, an Australia-wide organisation, was registered under the Commonwealth Act but not under the Tasmanian Trade Union Act. (As already mentioned, there is no industrial arbitration statute in Tasmania.) The Hobart branch was not registered at all. The Commonwealth Act contained no reference to political levies and whilst the rules both of the Federation and branch referred to levies there was no specific reference to levies for political objects. The Commonwealth Arbitration Act provided that a registered organisation should " for the purposes of this Act " have perpetual succession and a common seal.

The Tasmanian Supreme Court trial judge (Burbury C.J.) held that it was competent for the union rules to authorise the making of a levy for political purposes but that the union rules in the instant case did not in fact give such authorisation. The plaintiffs therefore remained members of the union. On the claim in tort he awarded damages on the basis of a conspiracy by unlawful means and of interference with the plaintiffs' contractual and statutory rights.

On appeal the High Court agreed that there was nothing in law which would forbid the granting by the union rules of a power to devote funds to the purposes of a political party. They regarded the decision in *Amalgamated Society of Railway Servants* v. *Osborne* [2] as one essentially depending on the limitations of the definition of "trade union" in the United Kingdom Trade Union Act and having no application to the Commonwealth Arbitration Act which contained no restrictive definition and merely provided, through regulations made under it, that an association applying for registration should be an association for furthering or protecting the interests of its members and that the rules of such an association might provide for any matter "not contrary to law."

The consensus of opinion was that the *Osborne* decision would probably apply to unions registered only under the state Trade Union Acts.[3] The state law, however, had no claim to determine the capacity and powers of an organisation which derived its status from Federal law. Whatever was the scope of the words "not contrary to law" it was not contrary to law that any person should engage in political activities.

It is noteworthy that the High Court, which incidentally handled rather critically the decision in *Bonsor* v. *Musicians' Union*,[4] regarded the fact of Federal registration as conferring full corporate status on the union. They refused to regard the words "for the purposes of this Act" as imposing any limitation. Substantially, the union as a Commonwealth corporation could by its rules be given any power which was directed to fostering the industrial interests of its members and which was not specifically illegal. Disagreeing with the Tasmanian court, they also held that the rules in the instant case should be interpreted as authorising the making of the political levy.

The result was that the plaintiffs lost their membership and as a result of the various statutory provisions regulating waterfront employment they should not, at the relevant times, have been allocated to work by the Authority unless no members of the Federation were available.

Turning to the question of tort liability, they held that there was no conspiracy to injure within the formulation of principle in the *Crofter* case.[5] The court adopted here the view of the Tasmanian judge that, though the existence of two rival political groups and the existence of some considerable Communist sentiment in the union had added to the bitterness, yet it could not be said

[2] [1910] A.C. 87. No statute corresponding to the U.K. Trade Union Act, 1913, is in force in Tasmania.

[3] It had, in fact, been so held in West Australia: *True* v. *Australian Coal and Shale Employees Federation* (1949) 51 W.A.L.R. 73. In so far as this decision also purports to apply to registration as an "industrial" union under a state Arbitration Act, the High Court would probably not approve of it.

[4] [1956] A.C. 104.

[5] *Crofter Hand Woven Harris Tweed Co.* v. *Veitch* [1942] A.C. 435.

that the dominant motive was to injure the plaintiffs. The dominant motive was to enforce a principle that majority decisions should be obeyed. The combination however was an actionable conspiracy because it had proceeded by illegal means. The allegation of unlawful means furnished indeed almost an embarrassment of riches, *viz.*, assault, offences of intimidation under the Tasmanian equivalent of section 7 of the (United Kingdom) Conspiracy and Protection of Property Act, 1875, a number of offences under the Stevedoring Industry Act, unlawful assembly and so on. Whilst the High Court justices seemed to accept the view that the picket lines in themselves constituted assault (as distinct from battery), the judgments of Taylor and Menzies JJ. (two of the three justices who delivered separate judgments) rely merely on the offences under the Stevedoring Industry Act. This is interesting because the reports do not seem to yield an instance of this type of civil conspiracy being held to be established and dicta in the *Crofter* case merely refer to "illegality."[6] One might well ponder how far liability extends and whether every type of offence committed as part and parcel of combined operations, for instance, a traffic offence, makes the combination an actionable conspiracy.

The High Court found it unnecessary to pronounce finally on the question of liability for infringement of contractual and other rights apart from the aspect of civil conspiracy. Burbury C.J. had certainly here ventured upon some novel extensions of the principle of *Lumley* v. *Gye*.[7] He regarded the barricade as interfering with the contractual relationship existing between the stevedoring employer and the plaintiffs. Fullagar J. pointed out that even assuming there was any contractual relationship existing at that point (which in itself he regarded as a wrong view), this would be a rather strange application of the principle. Not only was it difficult to see where the breach of contract lay, but also there was the fact that it was the constrainee or inducee who was being put into the position of complaining party.

The trial judge had also taken the view that the Stevedoring Industry Act placed a statutory duty on the employer to accept and put to work labour allotted to him by the Stevedoring Industry Authority and had regarded the "picket" barriers as constituting an interference with a correlative right of the plaintiffs which would bring *Lumley* v. *Gye* into operation. If the Court of Appeal decision in *Thomson* v. *Deakin*[8] made it necessary for the plaintiffs in such a situation to show independently wrongful acts, he was prepared to find them in the same acts which made the combination actionable as a conspiracy. This seems very confused reasoning. The High Court appeared to regard it as an attempt to find a cause of action for breach of statutory duty on the model of *Groves* v.

[6] *Ibid.*, at 445, 467.
[7] (1853) 2 El. & Bl. 216.
[8] [1952] Ch. 646.

Wimborne.[9] It is submitted that this was not what Burbury C.J. had in mind. Granting, however, that the principle of *Lumley* v. *Gye* is not limited to a contractual situation,[10] it seems that at least one must find a situation where the plaintiff stands possessed of some civilly enforceable right and it does not appear that the statutory framework of an Act designed to ensure a regular stream of labour to man ships and to mitigate the evils of casual employment is the right quarter in which to find it.

E. I. Sykes.

Maintaining A Wife

The Court of Appeal decision in *Lilley* v. *Lilley* [1] has removed many of the interesting possibilities which the Divisional Court appeared to open up [2] for re-examining some of the principles underlying the legal relations of husband and wife. The finding in the Court of Appeal that the wife had in law deserted her husband, and that therefore he need no longer maintain her, makes irrelevant any speculation whether the courts might find it possible to re-examine, in the light of present-day conditions and the actual state of affairs between the spouses, a wife's right to be maintained by her husband.

Once it has been decided that a husband should not be compelled to maintain his wife, the decision may at first sight appear more clear-cut, and certainly raises less awkward questions of underlying principle, if the wife is also found guilty of a matrimonial offence. The Court of Appeal went further and said [3] that "if the wife were not in desertion the husband must . . . have committed the offence" (of wilful neglect to maintain her). In other words, the wife's right to maintenance arises from the magic of the marriage ceremony; apart from agreement [4] it can only be lost by the equally strong magic of the matrimonial offence. No change in social conditions since 1895 is to be allowed to enlarge the field of inquiry. The question of maintenance as between husband and wife is, it is again confirmed, governed by considerations different from those applying to a husband's liability to the public assistance authorities.[5]

[9] [1898] 2 Q.B. 402.

[10] Thus, Dixon J. (as he then was) of the High Court of Australia regarded it as covering inducement of breach of the obligations of a common carrier: *James* v. *The Commonwealth* (1939) 63 C.L.R. 339, 370.

[1] [1959] 3 W.L.R. 306; [1959] 3 All E.R. 283. See further pp. 7–15, *ante*.

[2] [1958] 3 W.L.R. 728; [1958] 3 All E.R. 528.

[3] [1959] 3 W.L.R. at p. 314.

[4] The Court of Appeal expressly affirmed the decision of the Divisional Court in *Pinnick* v. *Pinnick* [1957] 1 W.L.R. 644; [1957] 1 All E.R. 873, and the cases there cited.

[5] See [1959] 3 W.L.R. 313, affirming *National Assistance Board* v. *Parkes* [1955] 1 Q.B. 486.

This dogmatic division of the field into mutually exclusive offences does not, however, necessarily mean that the law is simplified or that clients may expect more clear-cut advice from their legal advisers. For example, in considering the husband's position, the Court of Appeal said[6]: "as between the husband and the wife he cannot be found guilty of wilful neglect to maintain her unless he is a wrongdoer. The wrongdoing may, however, consist of the very fact of a failure to maintain." This can only mean: "a husband cannot be made to maintain his wife unless he has done wrong. The only wrong he has done may be that of not maintaining her when he should." The circularity of this argument appears complete.

The essential facts of *Lilley* v. *Lilley* were that, after the birth of her child, the wife developed a neurosis as a result of which she developed an invincible repugnance to sexual intercourse. Even the presence of her husband, and apparently that of other men also, became abhorrent to her. She entered a mental hospital in October 1952 and remained there until June 1956, except for short absences including the period from August to September 1953 and weekends from April to June 1954, when she returned to her husband's house, but felt unable to remain there. On leaving hospital in June 1956, she went to live with her mother and child, but remained an out-patient of the hospital. In July 1954, when told by her medical adviser that the wife's condition was probably incurable, the husband threatened divorce proceedings, as a result of which he was found to be in desertion and ordered to pay maintenance for his wife and child. In 1955, after the parties had met to discuss reconciliation, the wife wrote saying that it was impossible, and she replied to the same effect to letters which the husband wrote to her in 1957. The medical evidence was that the wife would be risking grave consequences to her mental health if she returned to her husband. The question in issue was whether the husband still remained liable to maintain her. The Divisional Court held that, although neither spouse had deserted the other, the husband was no longer liable to maintain the wife, since there was no agreement between them that she should be separately maintained.

The Court of Appeal was prepared to say that a husband's duty to maintain his wife continues "when there is a separation of necessity," and "This duty must surely subsist if separation is forced upon the parties by illness which compels residence in hospital . . . whatever the nature of the illness, even if it be mental disorder, provided always that the intention of the absent spouse to return to the other continues." But here "the attitude of the wife went far beyond saying: 'I cannot return to you at present.' She added, in effect, 'and I never will.'" Thus, as

[6] [1959] 3 W.L.R. at p. 313.

in the case of separation by agreement,[7] the question whether the wife could obtain a maintenance order against her husband turned not so much upon what she did as upon what she said. To this extent at least, legal advice to clients living apart from their spouses should be both simplified and extended. There may be financial advantage in limiting conversation with a spouse to the terms of a draft prepared by legal advisers.

O. M. Stone.

Status of a Disciplinary Committee

The case of *Addis* v. *Crocker*[1] was an action for libel against the members of the Disciplinary Committee of the Law Society. The question arose whether the written decision of the Disciplinary Committee was absolutely privileged, and in arriving at the conclusion that it was so privileged, Gorman J., besides considering the nature and basis of the privilege accorded to judicial proceedings, examined the status of the Disciplinary Committee.

The facts were that an application was made to the Disciplinary Committee on behalf of the Law Society in May 1958 asking that a certain solicitor should be required to answer allegations of professional misconduct set out in the application. The application contained complaints that the plaintiff, an inquiry agent, who had formerly been a solicitor but had been removed from the Roll, had co-operated with the clerk to the solicitor charged in the conduct of litigation in a way which was not proper. The Committee met to hear the application and the plaintiff applied to give evidence before the Committee refuting the allegations in the application referring to him, but his request was refused. The solicitor charged was acquitted of improper conduct on the ground that he had no knowledge of the matters complained of and he was discharged. In accordance with the requirements of the Solicitors Act, 1957,[2] and the rules made under it,[3] the Committee prefaced their order with a statement of their findings in relation to the facts of the case and the findings and order were then filed with the Law Society as required. Subsequently they were published and Addis brought this action for libel against Sir William Crocker,

[7] See the judgment of Lord Merriman P. in *Baker* v. *Baker* (1949) 66 T.L.R. (Pt. 1) 81, cited with approval in the judgment of the Divisional Court read by Lord Merriman P. [1957] 1 W.L.R. at p. 649: "Unless she can show, where the separation was consensual, that the husband had accepted a liability, expressed or implied, to maintain her, she has no case at all." Whether this decision will be affected by the provision in the Maintenance Agreements Act, 1957, that the courts may insert in a *written* separation agreement financial arrangements for the benefit of one of the parties, or whether, on the other hand, the courts will apply this provision only where they find an implied liability by the husband to maintain the wife, remains to be seen.

[1] [1959] 2 All E.R. 773; [1959] 3 W.L.R. 527.

[2] s. 49.

[3] The Solicitors (Disciplinary Proceedings) Rules, 1957 (S.I. 1957, No. 2240).

Sir Walter Norton and Sir Leslie Peppiatt, who were the members of the Committee in the case. The defendants pleaded that the findings and order were made by them as members of the Committee under the provisions of the Act of 1957 and the Rules thereunder and that as the publication occurred in the course of and formed part of proceedings before a statutory tribunal exercising judicial functions, it was absolutely privileged.

It is a well-established rule that whatever is stated by a judge in a judicial proceeding is absolutely privileged,[4] and indeed the protection extends to statements by parties, witnesses and advocates. Moreover, numerous cases in the reports [5] show that the rule is not limited to courts in the strict sense but has been carried further. The matter was summed up by Lord Esher M.R. in *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*,[6] when he said: "... it seems that this immunity applies wherever there is an authorised inquiry which, though not before a court of justice is before a tribunal which has similar attributes."

While the plaintiff accepted the principle there laid down, he submitted that it was quite absurd to say that the test laid down by Lord Esher applied in this case. The Committee, he argued, had not similar attributes to a court of law, nor could it be said that it acted in a manner similar to that in which such courts act. The plaintiff made numerous submissions in support of his contention but perhaps the most important one concerned the independence of the Committee. He argued that in judicial tribunals the judge was independent and took an oath, but the members of the Disciplinary Committee were not independent of the Law Society nor did they take an oath. The test whether the proceedings were judicial lay in the rule which forbade tribunals to have self-interest, but the members of the Committee, as solicitors, had an interest in the proceedings before them.

It is true that the Committee is composed entirely of solicitors, but the intention of the legislature in the various Solicitors Acts [7] has been to make solicitors masters in their own profession,[8] believing that solicitors themselves are the best judges of what amounts to professional misconduct on the part of a solicitor. Further, his contention raises the question of the nature of the relation between the Disciplinary Committee and the Law Society. As his Lordship pointed out, it is quite wrong to refer to the Disciplinary Committee as the Law Society, or as a committee of the Law Society. It is a body constituted under and regulated

[4] His Lordship referred in particular to *Munster* v. *Lamb* (1883) 11 Q.B.D. 588 and to *Scott* v. *Stansfield* (1868) L.R. 3 Exch. 220.

[5] See, *e.g.*, *Dawkins* v. *Lord Rokeby* (1873) L.R. 8 Q.B.D. 255; affirmed (1875) L.R. 7 H.L. 744—a military court of inquiry.

[6] [1892] 1 Q.B. 431, 442; approved in *O'Conner* v. *Waldron* [1935] A.C. 76, 81.

[7] Particularly the Acts of 1888, 1919, 1932 and 1957.

[8] See Lord Hewart C.J., *Re A Solicitor* [1934] 2 K.B. 463, at 466.

by the Solicitors Act, 1957.[9] It is appointed by the Master of the Rolls from among members of the Council of the Law Society and such former members as are practising solicitors. It is open to anybody to make application to the Committee,[10] but in fact nearly all the applications are made on behalf of the Law Society. Complaints made to the Law Society are, in appropriate cases, considered by the Penal Cases Committee of the Council [11] which makes such investigations as it thinks proper. If the Penal Cases Committee considers that disciplinary proceedings should be instituted, the Society's solicitors are instructed to make an application to the Disciplinary Committee and the Society's solicitors then have conduct of the case before the Committee. The essential point is, however, that the Disciplinary Committee is entirely independent of the Law Society even though its members are also members of the Law Society.

In deciding whether the Disciplinary Committee was to be regarded as a judicial tribunal or merely administrative in nature, Gorman J. referred to cases concerning a variety of tribunals.[12] In particular, he turned to the judgment of Sankey J. in *Co-partnership Farms* v. *Harvey-Smith.*[13] In that case Sankey J. turned to the regulations governing the tribunal [14] and considered the constitution, the functions and the procedure of the tribunal and he came to the conclusion that it was a judicial body and that its proceedings were absolutely privileged. The Solicitors Act, 1957, and the rules made under it give a detailed picture of the constitution, functions and procedure of the Disciplinary Committee. The picture given is clearly that of a tribunal judicial in nature and this is the conclusion at which his Lordship arrived.

This case, perhaps, does no more than underline the well-known fact, namely, the independent status and judicial nature of the Committee. But these factors are of great importance to solicitors, for the Committee is now the normal channel for the discipline of the profession. Although the jurisdiction of the High Court over solicitors has been preserved [15] it is now comparatively rarely exercised. Further, although an appeal lies to the High Court [16] from the decisions of the Committee, the High Court will not

[9] ss. 46 to 55 are concerned with disciplinary proceedings.

[10] Except that an application in respect of a clerk under s. 38 can only be made on behalf of the Law Society.

[11] For the work of the Penal Cases Committee and its relations with the Disciplinary Committee, see generally an article in the *Law Society's Gazette* (1957), p. 249.

[12] *O'Conner* v. *Waldron* [1935] A.C. 76; *Proprietary Articles Trade Association and Others* v. *Att.-Gen. for Canada* [1931] A.C. 310.

[13] [1918] 2 K.B. 405.

[14] A local military tribunal constituted under the Military Service Act, 1916, and the Military Service Regulations (Amendment) Order, 1916.

[15] Solicitors Act, 1957, s. 50.

[16] Solicitors Act, 1957, s. 48.

lightly interfere with the Committee's decisions.[17] Solicitors have thus truly become masters in their own house and because this is so, it is essential that the individual solicitor is safeguarded.

But the case also has a wider aspect which becomes apparent on considering the function of the Committee and its position in the whole organisation of the solicitors' profession. It is important to remember, too, that there are now some half-dozen or so other professions which are regulated by statute.[18] In all these professions some form of State registration has been introduced in the interest and for the protection of the public. In each profession the legislature has sought to make the qualified practitioner readily recognisable and to guarantee his integrity. In each profession there is a tribunal of some kind exercising disciplinary functions over the "qualified" members of the profession. The earliest of these was the General Medical Council[19] and in *Allbutt* v. *The General Council, etc.*,[20] the Court of Appeal held that the publication of the minutes of the Council containing a report of their proceedings comprising a statement that the name of a specified medical practitioner had been removed from the Register for professional misconduct was privileged. In determining whether such a report was privileged, Lopes L.J. considered the position, powers and duties of the Council. He said: "The Council are not a private association. They are a public corporation invested with large powers and privileges and charged with important duties—duties in which not only the profession, but the public at large are interested. They are authorised to hold quasi-judicial inquiries, inquiries involving the status and character of professional persons, members of their body, involving the rights of these persons towards the public and the right of the public towards them. . . ." He pointed out that the public were clearly interested in knowing the grounds on which the Council acted, for the influence of public opinion was a safeguard against the abuse of the powers entrusted to them. This point is now of less importance since in almost every case an appeal lies to the High Court or Privy Council[21] from the decisions of the disciplinary tribunals. However, it would appear that the public still has a close interest in gaining information of cases coming before disciplinary tribunals of professions providing personal or fiduciary services to members of the general public.

[17] See, *e.g.*, *per* Roche J. in *Re A Solicitor* (*No. 2*) (1924) 93 L.J.K.B. 761, at 763. See *Re A Solicitor* [1956] 3 All E.R. 516, where the court substituted suspension for two years for an order striking a solicitor off the Roll.

[18] The earliest statute was the Medical Act, 1858. There are now statutes regulating dentists, pharmacists, midwives, nurses, veterinary surgeons, architects and opticians.

[19] Originally called the General Council of Medical Education and Registration.

[20] (1889) 23 Q.B.D. 400.

[21] In the case of doctors and dentists the appeal is to the Privy Council. See, now, Medical Act, 1956, s. 56; Dentists Act, 1957, s. 29.

This aspect is perhaps best summed up by contrasting the situation in this case with that in *Hope* v. *I'Anson & Weatherby* [22] which was concerned with the publication in the *Racing Calendar* of decisions of the Jockey Club. It was argued that the decisions of the Jockey Club were quasi-judicial in character and that the publication of those decisions was of such public interest as to make it privileged. However, Collins M.R. said that even assuming that the decisions were quasi-judicial they were not of such general public interest as to make the occasion privileged; the decisions were of interest to a section of the public—those interested in racing matters—but they were not of interest to the public as a whole. In contrast, the decisions of the Disciplinary Committee of the Law Society or of some similar professional tribunal are of interest to the public as a whole since anyone may at some time want to consult a solicitor, doctor, dentist, etc., and feel assured of the integrity of the members of these professions.

J. G. Miller.

Documents of Title

In the case of *D. F. Mount, Ltd.* v. *Jay & Jay (Provisions) Co., Ltd.*,[1] the defendants sold 250 cartons of tinned peaches to a Mr. Merrick and made out two delivery orders in his favour, addressed to the superintendent of the wharf where the peaches were stored. Mr. Merrick explained that the price would be paid with cash received from customers, and indorsed the delivery orders " please transfer to our sub order," sending them to the superintendent of the wharf. Mr. Merrick sold the peaches to the plaintiffs and himself drew up a fresh delivery order which he gave to the plaintiffs and against which the plaintiffs gave Mr. Merrick a cheque for the price, which he cashed. Mr. Merrick never paid the defendants. The defendants claimed as unpaid sellers to exercise their rights of lien over the 225 cartons that still remained at the wharf. The plaintiffs, on the other hand, claimed that the defendants had lost their right of lien as they had " assented " to the sub-sale, and relied, in the alternative, on the proviso to section 47 and on section 25 (2) of the Sale of Goods Act, 1893. Salmon J. held that, as the defendants knew that Mr. Merrick could only pay the price out of money received from customers, the defendants had assented to the sub-sale and, therefore, under section 47, had lost their right of lien. That decision, which appears to be fully in accord with the authorities, for example, *Mordaunt Bros.* v. *British Oil and Cake Mills, Ltd.*,[2] was enough to dispose of the case. Salmon J. did, however, proceed to examine the other provisions relied on by the plaintiffs, namely,

[22] (1901) 18 T.L.R. 201 (C.A.).
[1] [1959] 3 W.L.R. 537; [1959] 3 All E.R. 307.
[2] [1910] 2 K.B. 502.

the proviso to section 47 and section 25 (2). The proviso, so far as it is material, reads:

> "Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien or retention or stoppage *in transitu* is defeated. . . ."

The wording is very clear and Salmon J. found that it had no application to the instant case, because it is confined to cases where a document is transferred to a buyer and the *same* document is then transferred by him to a sub-buyer who takes it in good faith and for valuable consideration. Mr. Merrick did not transfer to the plaintiffs the delivery orders he had received from the defendants; he made out a fresh delivery order in favour of the plaintiffs, and so the proviso to section 47 had no application.

However, Salmon J. then went on to say that the plaintiffs were entitled to rely on section 25 (2) which reads as follows:

> "Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale . . . thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner."

The learned judge took the view that the language of this subsection is less rigorous than that of the proviso to section 47, and "does not compel me to hold that the subsection applies only in those cases where the buyer transfers the same document as that of which he is in possession with the consent of the seller. I would observe that there seems to be no authority on this point."

There is, it is true, no authority on this point, but it seems doubtful whether the interpretation of it given in this case is correct. It is worth considering the background of section 25 (2) and of section 9 of the Factors Act, 1889, with which it is substantially identical.[3]

It was section 4 of the Factors Act, 1877, that first provided for the case of a buyer allowed to have possession of documents of title to goods:

[3] s. 9 contains additional words "or under any agreement for sale, pledge, or other disposition."

> "Where any goods have been sold or contracted to be sold, and the vendee, or any person on his behalf, obtains the possession of the documents of title thereto from the vendor or his agents, any sale, pledge, or other disposition of such goods or documents by any such vendee so in possession or by any other person or agent entrusted by the vendee with the documents within the meaning of the principal Act as amended by this Act shall be as valid and effectual as if such vendee or other person were an agent or person entrusted by the vendor with the documents within the meaning of the principal Act as amended by this Act, provided the person to whom the sale, pledge, or other disposition is made has not notice of any lien or other right of the vendor in respect of the goods."

It will be noticed that, unlike section 25 (2), there was no provision that the transaction must be executed by a delivery or transfer, or that possession should be with the seller's consent. Further, it did not cover the position of a buyer in possession of the goods themselves.[4] However, this very fact helps to make the construction of section 4, in one respect at any rate, easier. The sale, pledge, or other disposition by the original buyer is of "such goods or documents." The word "such" clearly governs the word "documents" and the section does not cover the possibility of the buyer disposing of some document other than the document of title he is in possession of with the seller's consent.

Section 25 (2) of the Sale of Goods Act, 1893, does deal, of course, with the position of a buyer who is in possession of either the goods themselves or documents of title to the goods. In the light of the earlier provision in the Factors Act, 1877, it seems reasonable to maintain that where the subsection refers to the delivery or transfer by the buyer of "the goods or documents of title," the word "the" governs "documents," so that the subsection does not apply unless the buyer does transfer the same document of which he is in possession with the seller's consent.

Salmon J. said that the object of section 25 (2) is to protect an innocent person in his dealings with a buyer who appears to have the right to deal with the goods in that he has been allowed by the seller to be in possession of the goods or documents of title relating to them. He went on to say that the defendants (the original sellers) sent the documents of title to Mr. Merrick with the intention that they should enable him to obtain money from the customers. "With the help of these documents," said Salmon J., "which he sent to the wharf so that the wharfingers would give a reassuring reply to any inquiry that the plaintiffs might make, or at least not to query any delivery order they received from the plaintiffs, Mr. Merrick managed to obtain a substantial sum of money from the plaintiffs." That, with respect, does not appear to be a correct assessment of the facts. *If* the

[4] See *Benjamin on Sale* (8th ed., 1950), pp. 43–44.

plaintiffs had made such inquiry of the wharfingers before paying, then Mr. Merrick would have obtained the plaintiffs' money with the help of these documents of title given him by the original sellers. As a result, apart from the question of "assent" to the sub-sale, the defendants might well have been estopped from denying the plaintiffs' rights to the goods under section 21 (1) of the Sale of Goods Act, 1893.[5] But, in fact, Mr. Merrick obtained the plaintiffs' money not with the help of those documents of title at all, but simply against a fresh delivery order drawn up by himself. Section 25 (2) was surely not meant to protect a sub-buyer in such a case.

Certainly, the textbooks seem to have assumed up to now that section 25 (2) only applied if the transfer of a document of title to a sub-buyer was a transfer of the same document as that transferred to the original buyer.[6] The proviso to section 47 may seem clearer simply because it deals only with documents and not the goods themselves, but it would be odd if the two provisions were meant to have a different effect.

GORDON BORRIE.

DOCTOR TO THE RESCUE

IN *Baker* v. *T. E. Hopkins, Ltd.*,[1] the Court of Appeal has strengthened the line of authority of the "rescue" cases. Although the decision itself does not break new legal ground, the judgments in the Court of Appeal provide a welcome authoritative restatement of the basic principles involved.

The defendant company had been engaged to clean a deep, narrow well. H., the managing director of the company, decided to use a petrol-driven pump to empty the well of water, and the pump was lowered down the well on to a small platform reached by two ladders. H. made a test of the atmosphere in the well by lowering a lighted candle placed in a bucket, and the candle was still alight when raised to the surface. H. and an employee of the company, W., went down the well after the petrol engine was started and when they came up to the surface W. remarked casually: "By gum, you couldn't stay down there long; the fumes would kill you"; to which H. replied, "That's how they commit suicide in motor-cars." The exhaust from the petrol-driven engine contained carbon monoxide, which, in the confines of the well, would gradually build up a concentration of lethal gas. It was accepted that the method employed was improper and highly dangerous and that the lighted candle test was quite useless for the effective detection of carbon monoxide. H. did not appreciate the grave dangers of the system but his lack of knowledge and

[5] See *Henderson & Co.* v. *Williams* [1895] 1 Q.B. 521.
[6] See, *e.g.*, *Benjamin on Sale*, p. 865.
[1] [1959] 3 All E.R. 225; [1959] 1 W.L.R. 966.

experience and failure to take advice exposed the company's workmen to unnecessary risks. Later H. had some misgivings about the work and made a further lighted candle test. The candle was extinguished after being lowered a little way. H. left the well but told W. and a fellow employee, X, "Don't go down the well tomorrow until the fumes have cleared." Later that day, when W. and X had left, H. made a further inspection of the well, since he was uneasy about the condition in it. On the following morning H. met W. and X at the defendant's premises when they were about to go off to the well, and he said to them: "Don't go down that bloody well till I get there." However, anxious to get on with the job, the workmen did not wait for H. W. went down the well and was overcome by the fumes; X went down to help W. and was also overcome. Subsequently, a Dr. B. arrived and decided to go down the well in order to help the two men. He was asked not to go down since he might "only make a third," but "prompted by the finest instincts of humanity" he lowered himself down by a rope, having arranged to be pulled up when he called. Dr. B. also was overcome by the fumes and when he was being pulled up, the rope became caught inside the well and it could be raised no further. In the result, W. and X and Dr. B. lost their lives. An action was brought against the defendant company in respect of the death of Dr. B.[2] under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934. Barry J.[3] held that the defendant company had adopted a highly dangerous system of work and were in breach of their duty as employers towards their employees W. and X. It was as a result of this negligence, and not the employees' disregard of the orders not to go down the well, that the accident was caused, because those orders, on their wording and in the light of the circumstances in which they were given, were insufficiently precise and urgent to absolve the defendant company from blame. Not only was the defendant company in breach of its duty of care owed to W. and X, but (following *Haynes* v. *Harwood*[4]) it was also in breach of a duty of care owed to Dr. B., for it should have reasonably foreseen that if, through negligence, the lives of W. and X were imperilled, a person in the position of Dr. B. would have attempted to rescue W. and X. Barry J. could find no support for the argument that since the duty owed by an employer to his workmen is personal to them, there is no room for the "rescuer" and that the *Haynes* v. *Harwood*

[2] This note will be confined to the action taken by Dr. B.'s personal representatives. W.'s estate recovered damages against the defendant company, but since there had been contributory negligence on the part of W., his responsibility was apportioned at one-tenth. The Court of Appeal refused to interfere with this finding.

[3] [1958] 1 W.L.R. 993; [1958] 3 All E.R. 147.

[4] [1935] 1 K.B. 146 (C.A.)—the case of the policeman who was injured when trying to stop two horses which had run away on a crowded highway as the result of the negligence of the defendant.

doctrine had no application when the act of negligence which caused the peril, arose out of the relationship of master and servant.

The Court of Appeal upheld the "very careful judgment" of Barry J. and itself carefully analysed the method of approach to the "rescue" cases. First, it was established that the defendant company was negligent towards its employees W. and X. The fact that H. had instructed W. and X not to go down the well was not, in the circumstances, a sufficient warning to discharge the high standard of care owed by an employer to an employee.[5] Had H. told W. that it might well be fatal if he went down the well, the position would have been different.[6] Secondly, such negligence caused W. and X to be in peril. Thirdly, this could have been reasonably foreseen; and fourthly, it could also have been reasonably foreseen that someone would be likely to seek to rescue them from their peril and might either suffer injury or lose his life. Applying Lord Atkin's neighbour test in *Donoghue* v. *Stevenson*[7] that "you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour" the court accepted that "danger invites rescue" and that such a rescue in this case was reasonably foreseeable. Therefore, not only did the defendant company owe a duty of care towards W. and X, but it also owed a duty of care to the rescuer, Dr. B.

The court swiftly disposed of all the arguments set up to defeat Dr. B.'s claim. There was no *novus actus interveniens*, since Dr. B.'s act was the very type of conduct which the defendant company should have foreseen. It was then argued that Dr. B. had been "unreasonably brave." The court accepted, however, that he had in no way acted recklessly or negligently. At the same time Morris L.J. did suggest that "if a rescuer acts with a wanton disregard of his own safety it might be that in some circumstances it might be held that any injury to him was not the result of the negligence that caused the situation of danger." Lastly, it was argued that the claim could be defeated by the defence of *volenti non fit injuria*. This was indignantly refuted: *sciens* is not *volens*, and in any case the unanimous opinion of the court was that this defence should not apply to cases where the defendant's negligence had made the rescue attempt reasonably foreseeable.

The method of approach in rescue cases is now firmly established, and several propositions may now be examined in order to see how far the courts have progressed since Professor Goodhart's famous article[8] was first published.

[5] *Cf.* Occupiers' Liability Act, 1957, s. 2 (4) (*a*)—a warning of a danger will not necessarily absolve the occupier unless in all the circumstances it was enough to enable the visitor to be reasonably safe.

[6] *Per* Ormerod L.J.

[7] [1932] A.C. 562.

[8] "Rescue and Voluntary Assumption of Risk" (1934) 5 C.L.J. 192.

1. Where A negligently imperils the life or limb of B and it can be reasonably foreseen that C will rescue B, A owes a duty of care to C (*Haynes* v. *Harwood*; *Baker* v. *Hopkins*).

No one can doubt that such a duty of care is desirable and "it would be a little surprising if a rational system of law in these circumstances denied any remedy to a brave man who had received his injuries through the original default of the defendant."[9] But this does not mean that a rescuer should be given a remedy in every case. The court must be satisfied that the plaintiff was himself acting reasonably in the circumstances, and this will, of course, depend upon whether the risks taken by the rescuer were justified having regard to the peril involved.[10] This seems obvious, but what is not so obvious is whether one has to judge the behaviour of the plaintiff objectively. In *Haynes* v. *Harwood* the rescuer was a policeman and in *Baker* v. *Hopkins* the rescuer was a doctor: both cases where one would expect the brave acts undertaken. But any citizen will be given a similar remedy in similar circumstances, even though he is not a member of a body accustomed to perform acts of heroism.[11] Thus, a passer-by who rushes into a burning house to rescue a child would generally have a remedy against the negligent fire-raiser. However, if the passer-by had been told by a fireman that it was too late and that nothing could be done for the child inside who was almost certainly dead, then, if he still rushed into the house it seems fairly clear that he would have no remedy as he was not acting reasonably but recklessly. But what if the passer-by is the child's father? By objective standards he may not be acting reasonably, but by subjective standards he is. In many cases of negligence the unexpressed attitude of the courts appears to limit the scope of the duty of care in accordance with the desirability of giving a remedy.[12] A duty of care will legally exist if the courts are of the opinion that the harm caused is such that the responsibility for it can reasonably fall upon the defendant. Can the courts say that a duty of care is owed to one type of rescuer but not another depending upon subjective influences? It is thought that the court will have to draw the line somewhere and probably the test of whether a rescuer is acting reasonably will be an objective one—although "objective" standards are often modified when one considers the nature of the behaviour "in the circumstances."

[9] *Haynes* v. *Harwood* [1935] 1 K.B. 146, 152, *per* Greer L.J.

[10] It now appears clear that the decision of the Court of Appeal in *Cutler* v. *United Dairies* [1933] 2 K.B. 297 (the reasoning of which was criticised in *Haynes* v. *Harwood*) is not a major obstacle to recovery in rescue cases, and the case can be confined to its own facts.

[11] See *Morgan* v. *Aylen* [1942] 1 All E.R. 489.

[12] *e.g.*, *King* v. *Phillips* [1953] 1 Q.B. 429; *Bourhill* v. *Young* [1943] A.C. 92.

2. Where A negligently imperils the *property* of B and it can be reasonably foreseen that C will attempt to intervene to protect B's property, A owes a duty of care to C.

The authority for this is *Hyett* v. *Great Western Ry.*[13] Of course C would not normally be justified in taking the same risks as he would if saving life, and the courts will again give or deny a remedy to C depending upon whether it thought C was acting reasonably in the circumstances. The guiding principle here is that: "Undoubtedly more risks may be taken to protect life than to protect property without involving the imputation of negligence, but the rule is that a reasonable effort may be made even in the latter case."[14]

3. Where B negligently places *himself* in danger and it can be reasonably foreseen that C will rescue B, it is uncertain whether B owes a duty of care to C.

In *Baker* v. *Hopkins* it was argued that even if the defendant company was not personally liable in negligence it was vicariously liable to the doctor because of the negligence of the employees, W. and X (notwithstanding that the employees were acting contrary to express instructions). This involved a discussion of whether the employees owed a duty of care to the doctor. Barry J. found it unnecessary expressly to decide this point, but said with "some hesitation and doubt" that "although no one owes a duty to anyone else to preserve his own safety, yet if, by his own carelessness a man puts himself into a position of peril of a kind that invites rescue, he would in law be liable for an injury caused to someone whom he ought to have foreseen would attempt to come to his aid." In stating this Barry J. was forced to disagree with a Canadian decision[15] where it was held that no such duty can be owed. The Court of Appeal in *Baker* v. *Hopkins* also found it unnecessary to discuss this question, and so the point still remains open. It is respectfully submitted that the view put forward by Barry J. is correct. If A negligently places B in danger and C reasonably attempts to rescue B, then C can recover. So far as C is concerned his act may be just as reasonable and just as heroic if it is B who has placed himself in danger. And the attitude of the courts is to examine the reasonableness of the behaviour of the rescuer rather than the act of the negligent person. It would be out of keeping with the present judicial trend to hold that a rescuer could only recover damages if there was a primary tort committed against somebody else. The same principle should also apply to cases where a person negligently imperils his own property.

GERALD DWORKIN.

[13] [1948] 1 K.B. 345 (C.A.).
[14] *Wardrop* v. *Santi Moving and Express Co.* (1922) 233 N.Y. 227, *per* Andrews J.
[15] *Dupuis* v. *New Regina Trading Co., Ltd.* [1943] 4 D.L.R. 275, following an American case *Saylor* v. *Parsons* (1904) 122 Iowa 679. See (1943) 21 Can. Bar Rev. 758.

Mistake of Identity and a Third Party

The ever-controversial topic of mistake of identity in contract has once more troubled the courts in the recent New Zealand case of *Fawcett* v. *Saint-Mérat* (*Star Car Sales, Ltd., Claimant*).[1] The facts of this case were that the plaintiff sold a car to the defendant, in payment for which the defendant gave a worthless cheque. The plaintiff later signed judgment by default against the defendant and sought to have the car seized in execution. In the meantime, however, a woman whose real name was Diana Mary Doreen Davies had sold the car to Star Car Sales, Ltd., having adopted the plaintiff's name for the purposes of this transaction. In interpleader proceedings the plaintiff contended that the effect of the deception used by the woman Davies was to bring mistake of identity into operation so as to prevent the formation of a contract between her and Star Car Sales, Ltd., and thus leave the property in the car in the defendant. It would then follow that the car could be seized for the plaintiff.

Hardie Boys J. disposed of the main point in the case by holding that a third party cannot raise from the outside the issue of mistake so as to have the contract declared void.

> "The obstacle, therefore, with which Mr. Vautier [counsel for the plaintiff] is confronted at the outset is this; what right has the plaintiff to insist, where the claimant does not, that there was no contract ever entered into? I have looked at all the cases cited and a good many more to see whether (outside the two classes of case where the contract was illegal or against public policy, or where the attack on the contract was brought by some such person as an Official Assignee) there is any case where a third party has been allowed to raise in the name of one of the contracting parties this question of mistake as to identity so as to have the contract avoided. But I find no such case. On that ground alone I would find against the plaintiff's case."[2]

This statement of principle should perhaps be taken with the fact, upon which the learned judge laid emphasis elsewhere in his judgment, that the victim of the mistake had raised no complaint and had, in fact, expressed itself to be perfectly satisfied with the allegedly void transaction.[3] Without this qualification the principle laid down by Hardie Boys J. might create difficulties for innocent purchasers from those responsible for creating the mistake, as, for example, Messrs. Cundy in *Cundy* v. *Lindsay*.[4] Surely in the case of a sale of goods such a person can rely as against the person responsible for the mistake on a breach of the conditions now

[1] [1959] N.Z.L.R. 952.
[2] *Ibid.*, 954.
[3] See, on affirmance of a contract void for mistake of identity, Dr. Glanville Williams, (1945) 23 Can.Bar Rev. at pp. 396–397.
[4] (1878) 3 App.Cas. 450.

implied in contracts for the sale of goods by section 12 (1) of the Sale of Goods Act, 1893? But an essential part of the innocent third party's case in such circumstances would be to show exactly how his seller's title was vitiated. If the true owner chose to remain inactive the broad rule in the passage cited could leave the third party under the threat of proceedings for conversion until either the full period of limitation had run or the inactivity had been so prolonged or so coupled with other circumstances as to amount to conduct precluding the true owner from denying the seller's authority to sell within section 21 (1) of the Sale of Goods Act, 1893.

Hardie Boys J. went on to say that in his opinion there was no operative mistake on the facts before him. There was no reason to doubt that the woman Davies was the agent of the defendant in selling the car to Star Car Sales, Ltd., and had done just what she was authorised to do—dispose of the car and hand over possession and the registration certificate in exchange for a cheque. The learned judge thought that in these circumstances it was unreal for the plaintiff to raise the issue of mistake because that would be to put into the mouth of Star Car Sales, Ltd.,

> "... the ridiculous assertion that, having dealt with a person who was authorised to sell the car on behalf of the true owner, it has a ground of complaint because, in fact, it thought it was dealing with and paid its money over to someone else who did not own the car at all." [5]

He continued by saying that another factor which distinguished the plaintiff's claim from that disclosed in any of the authorities cited (except *Lake* v. *Simmons* [6] where the question of insurance was involved) was that in them it was a vendor of goods who had parted with possession of them who sought to prove mistake of identity. It is submitted with respect, however, that this can be regarded as an accident of litigation and provides no satisfactory ground for refusing to allow a "sub-purchaser" to take the initiative in complaining of a breach of the condition as to title on the part of the person responsible for the mistake.[7]

Counsel had raised the question whether a confusion of identities was enough to render a contract void or whether, in addition to such confusion the personal factor had to be material. On this Hardie Boys J. said that, having regard to his decision that the plaintiff could not raise the point of mistake in any event, it was

[5] *Ibid.*, at p. 956. Though the learned judge later said that it was not essential for him to decide whether a mistake of identity had to be material or not, this seems to tell in favour of materiality.

[6] [1927] A.C. 487.

[7] Despite the fact that at p. 956 the learned judge mentions Holmes, *The Common Law*, p. 308, in which he says a seller is referred to as the victim of mistake. This seems explicable as undue reliance on [1927] A.C. at 502.

unnecessary for him to express an opinion but he would add a few remarks in case the question went on appeal.[8]

These further remarks, though carefully guarded, do contain some rather interesting points.[9] First, he appears to regard Lord Haldane in *Lake* v. *Simmons*[10] as approving *Phillips* v. *Brooks*[11] as deciding that when there is a consensus with a person identified by sight and hearing any misrepresentation merely makes the contract voidable and not void. He rejects Dr. Goodhart's view that Lord Haldane's explanation of *Phillips* v. *Brooks* could have been replaced by a simple overruling in favour of the statement by Hallett J. in *Dennant* v. *Skinner*[12] that as far as he knew *Phillips* v. *Brooks* had never been judicially questioned.

He went on to say that on the facts of the case before him Mrs. Davies possessed all the legal qualities sought by Star Car Sales—capacity to give delivery and a good title—" and it mattered nothing to [them] in the result whether for purposes of her own Mrs. Davies falsely called herself Fawcett."

He admitted that if she had used her true name that might have led to inquiries and Star Car Sales might not have completed the purchase.

> " But that is not the test: it does not matter that one party would not have entered into the contract but for the misrepresentation if, in fact, he was willing to contract with the person present, identified by sight and hearing: see *Phillips* v. *Brooks*." [13]

He then went on to cite Lord Atkin's remarks in *Bell* v. *Lever Bros.*[14] on mistake negativing and nullifying consent and his famous passage to the effect that if parties agree in the same terms on the same subject-matter, they are bound and must rely on the stipulations of the contract for protection from the effects of facts not known to them. In the instant case he thought that

> " nothing had so operated on the mind of the claimant's servant to negative or nullify the consent he gave to the purchase of the very car in question at the very price agreed upon—the same subject-matter, the same terms."

[8] Dr. Goodhart's article in (1941) 57 L.Q.R. 228 was cited by counsel for the plaintiff in support of his argument that the personal factor need not be material. With all respect it may be regretted that reference was not also made to Dr. Glanville Williams' contentions to the contrary effect in 23 Can. Bar Rev. 380–396.

[9] See [1959] N.Z.L.R. at pp. 956–957.

[10] [1927] A.C. 498.

[11] [1919] 2 K.B. 243. The point not being taken that Lord Haldane, by explaining *Phillips* v. *Brooks* on a ground other than that on which it was expressly decided, must be taken to have disapproved that express ground. See Glanville Williams, 23 Can.Bar Rev. 276, n. 11.

[12] [1948] 2 K.B. 164.

[13] It will be recalled that recent articles on mistake of identity have approved, for varying reasons, of Horridge J.'s express grounds of decision in *Phillips* v. *Brooks*. See Wilson, " Mistake of Identity in Contract and the Pothier Fallacy " (1954) 17 M.L.R. 515, at 523–524; Unger, " Mistake of Identity and Mr. Wilson's Fallacy " (1955) 18 M.L.R. 259, at 266.

[14] [1932] A.C. 161, 217.

He concluded his remarks on the law of mistake by citing Lord Denning's remarks in *Solle* v. *Butcher* [15] that all previous decisions had to be viewed in the light of *Bell* v. *Lever Bros.* and his survey of the mistake of identity cases. Hardie Boys J. does not make explicit his reasons for referring to this review of the cases but one explanation might be that it is there suggested that mistake merely renders a contract voidable and not void. This would be an additional ground for deciding in favour of the claimants in the case before him.

This case, then, seems to be of interest as suggesting limits to the rights of third parties to raise questions of contractual mistake and as showing that *Phillips* v. *Brooks* has not ceased from troubling. Whether as guide or warning light the decision clearly shows that many complex problems of mistake still await the accidents of litigation for their solution.[16]

A. H. HUDSON.

[15] [1950] 1 K.B. 671. See Grunfeld, "Common Law and Equity in Contractual Mistake" [1952] 15 M.L.R., esp. 317–318.

[16] The statement of facts does not make it clear whether or not a further problem might not have been raised—whether the claimants had independent knowledge of the existence of the plaintiff at the time when they entered into the contract of purchase. On this, see Glanville Williams, 23 Can.Bar Rev. 282–287.

CORRESPONDENCE

To the Editor,

The Modern Law Review.

Sir,

The writer of the letter published in your November number, in commenting on my brief article on "Some Basic Principles of Hungarian Criminal Law," has mainly argued from the mere wording of the laws. However, the meaning of words in Hungarian criminal law does not always conform with their conventional meaning but is to be found in their interpretation. It seems to be rather difficult to argue from a purely legal basis about another legal system which is so strongly subject to constantly changing political requirements and where "the bellicose Bolshevik Party mind must be embodied in the science of criminal law, too" (quoted from the official Hungarian edition of the Soviet textbook of criminal law, published in 1951, p. 10). As I pointed out in my article, the words exist there as frames only, to be filled in with a content which conforms to reason. Your correspondent's observations have not moved me to alter the views that I expressed in that article.

Apart from this, actual errors have appeared in the letter. Among others and the most important of all, the official edition of the Hungarian "Legal Rules in Force" clearly shows the skeleton character of the Act No. V of 1878, all the essential parts of which have been replaced by the new rules.

On the other hand, I welcome any resumption of activity in "the science of criminology." As far as I know, since 1951 Criminology has not been taught and has really not been accepted as a science but has been handled like some heresy.

Stephen Schafer.

20 Denbigh Road,
London, W.11.

REVIEWS

Authority. Edited by Carl J. Friedrich. [Cambridge, Mass.: The Harvard University Press; London: Oxford University Press. 1958. viii and 304 pp. 40s. net.]

This is the first volume of an annual series which is to be published by the American Society for Political and Legal Philosophy under the title of *Nomos*. Should its successors attain the same quality and interest as the present work its yearly appearance will come to be looked forward to eagerly by all those interested in the wider aspects of law and politics. Not that the quality here reaches a standard of uniform excellence—indeed it is somewhat patchy—but that there is here much that is stimulating and thought provoking, which is I think the primary desideratum in discussions of subjects which have been under argument for centuries.

The contents of the volume are broadly indicated in the title: they consist of papers read at a meeting of the Society, of notes arising from contributions to discussion, and of some specially written articles. They are divided into three main groups which purport to cover a general philosophic approach, the historical perspective, and the socio-political perspective, though in fact there is some overlapping, as indeed was to be expected.

In early discussions of authority the attempt was seldom made to demarcate it from power. Starting with Max Weber's well-known contribution to the subject the nature of authority has become better realised, but it cannot be said that any fully effective analysis has been produced, nor has there been much in the way of full-length studies of the subject; though recent interest in it, undoubtedly stimulated by the totalitarian conception of authority associated with the names of Mussolini and Hitler, has led to a good deal of writing in the periodicals, particularly perhaps in the U.S.A.

It cannot really be said that the authors of the articles in this book reach any finality of agreement on the nature of authority or of its precise relationship with power. Yet several of the discussions are so acute and fertile in ideas that one feels that the ground has been well tilled, and is now ready for the considered work of a master of political science.

As one would expect in a mid-twentieth century discussion the semantic aspect is a good deal canvassed, and with valuable results, particularly by Bertrand de Jouvenal in his "Authority: the Efficient Imperative." Professor Friedrich, too, in his "Authority Reason and Discretion" has some sensible points to make on this aspect of the matter.

To me one of the most interesting points which emerges is that the whole subject has until quite recently been obscured by the too great emphasis on what may be called the classical conception of authority, which stems from Plato. That philosopher's political experience was pretty much bounded by the Greek city state with its periodical irruptions of tyrannous power. He was concerned to establish the rule of reason; his unconditional major premise no doubt being the dominant role which philosophers would then play. But some tyrants were very reasonable beings, and the philosopher king was in practice too much like them to be easily distinguishable in the world of affairs. Authority came therefore to be equated with reasonably wielded power, and then in Roman times with constituted power, and later again in medieval Europe with power according to law, and still later with divinely granted power which merges without difficulty into the authoritarianism of Mussolini and Hitler.

The power element is only too obvious throughout this development. Yet according to Dr. Hannah Arendt, whose authoritative and fascinating chapter

"What was Authority?" is certainly one of the highlights of this volume, and to whom we owe this illuminating historical disquisition, there is no connection at all between authority and power, or rather with that kind of power which is based upon external coercion. This view receives a good deal of support from other contributors. Indeed it might be said that there is fairly general agreement that in the modern liberal and democratic world of the West authority is principally concerned with the arrangements made by the properly constituted leadership for organising the community, or those of its subsections through which the modern community functions. As Professor Friedrich indicates, it is largely a matter of communication, a communication which must "possess the potentiality of reasoned elaboration," which in essence means that the "authorities" must adjust their work to what is in the long run acceptable to the community. And Dr. Arendt therefore contends that the old power conception of authority is a thing of the past.

It is of course not difficult to find uses of the term authority in which it is completely divorced from power, unless one uses that word in an extremely metaphorical sense: thus the authority of a scholar or a scientist is well recognised. And here we might say that persuasion is the dominant element rather than power. Yet it is not strictly accurate to describe such authority as persuasive because the essence of the situation is that it is accepted and acted upon without argument.

It might be contended that such peripheral uses of the concept do not really throw any light on it, but even in the political field the authority of rulers without real power has often been recognised. And the Roman senate retained authority even at the time when Commodus included his horse among its number. While today in England the House of Lords has no real power though it is certainly not without authority.

Another fruitful line of exploration is the relationship of authority and liberty. This is touched upon by a number of the contributors, though it hardly receives the attention which it deserves. Professor Hendel's "Exploration of the Nature of Authority" is a good deal conditioned by the growth of the American polity in which the problem of liberty has of course been of outstanding importance. Professor Frank Knight in "Authority and the Free Society" is impressed with the difficulty inherent in the "free society" which is "largely a tissue of agency relationships." He looks to the authority of leadership to prevent the tissue from getting into a tangle, and evidently feels that the prospects for the future are dim unless international authorities endowed with a modicum of power can be brought into effective existence. An aspect of this matter which in the U.S.A. naturally comes in for some discussion is "Authority and Colonialism," the essay on which is contributed by Mr. W. H. Kraus. Here the power aspect of authority is only too evident, and it is useful for the reader to be brought back to a realisation that the classical conception still rules over much of the world.

Lawyers will naturally turn with lively anticipation to Professor Jerome Hall's "Authority and the Law." This is obviously an important aspect of the subject and although his contribution is short Professor Hall illuminates it in more than one respect, and in others throws out suggestions which would repay further elaboration, as in the paragraph on the "authority of legal precedent." But of course there are many legal uses of the term authority the study of which throws light upon the general conception. Another fruitful field of exploration both for the lawyer and the political scientist is discretion, on which Professor Friedrich has some useful remarks. The position of a judicial officer exercising a discretion has hardly received sufficient attention in the books on jurisprudence but it would repay analysis, especially if considered in relation to the administrator's discretion.

Finally some notice must be taken of the remarkable article on "Authority, Legitimation and Political Action" by Professor Talcott Parsons. He is, as in most of his sociological work, particularly concerned with the social

structure and the cultural values which it is so largely developed to sustain. Authority plays an at first sight unexpected, but a fascinating and clearly an important, role in this area of human activity, and Professor Parsons' analysis of this is certainly one of the most stimulating things in the book.

C.

STRUKTURPROBLEME DER MODERNEN DEMOKRATIE. By GERHARD LEIBHOLZ, DR.JUR., DR.PHIL. [Karlsruhe: Verlag C. G. Müller. 1958. ix and 304 pp. DM. 18.80.]

DR. GERHARD LEIBHOLZ is one of Germany's most distinguished jurists. As a young man in the days of the Weimar Republic he made his mark with a series of penetrating essays on public law and legal theory. Under the Hitler régime he went into exile for his political beliefs. After spending the war years in England he returned to academic life in Western Germany. He is now a judge of the Federal Constitutional Court, Editor of the *Jahrbuch des öffentlichen Rechts,* Professor in the University of Göttingen and an eminent author and lecturer on the fundamental issues of law and politics.

The present volume is a collection of Dr. Leibholz's major articles and addresses, ranging over a period of nearly thirty years. The contributions were written in several countries and in a variety of political environments, and their themes extend from the case for proportional representation in Germany to the perennial problems of philosophy. Yet the volume, far from being a general miscellany, is characterised to a remarkable degree by unity and continuity. Dr. Leibholz has steadfastly maintained his devotion to the essential values of democracy and to the proposition that those values must ultimately rest on metaphysical foundations. He writes as a teacher as well as a scholar, and his own scale of value-judgments is always apparent.

The book falls into four parts. The first deals with democracy and electoral law; the argument here is set mainly in German contexts. The second part, which bears the same title as the book itself, is by far the most substantial and important. It includes studies of various aspects of pre-Hitler and post-war constitutional developments in Germany, of the role of the judge in constitutional litigation, of the defects of corporate representation in legislative bodies, and of the legal consequences of unconstitutional action, and a perceptive essay on the concepts of state and society in British political thought. Above all, it includes a searching analysis of the modern transformation of parliamentary democracy. To the author there is an underlying tension between the concepts of liberty and equality, in so far as political equality results in egalitarianism, which calls for restrictions on individual freedom and the imposition of positive obligations on governmental authorities to promote greater equality. Again, the principle that the will of the majority shall prevail potentially endangers the principle of freedom to oppose. Hence it may be necessary to limit the will of the parliamentary majority by constitutional prohibitions and guarantees. However, there is no sound reason why liberal principles of toleration should extend to political groups that strike at the fundamental basis of the democratic order. The Bonn Constitution accepts this proposition, and the *Sozialistische Reichspartei* and the Communist Party have accordingly been held by the Federal Constitutional Court to be unconstitutional bodies.

When a political party is held to be unconstitutional, what becomes of its representatives in the legislature? The answer offered by the classical Burkean theory is unequivocal: they should retain their seats, for they occupy them as representatives of the nation answerable to their own consciences, and not as delegates of their constituents or their party. But the liberal idea of parliamentary representation is outmoded and moribund; modern elections are in effect plebiscites, the legislator is first and foremost a party

man, and his constitutional status and rights must be viewed against that background. The dominance of the party system has, moreover, made the old theories of popular sovereignty irrelevant; the party has become the effective political organ of the people. These trends are irreversible. The remedy is not to hanker after a faded liberal ideal but to regulate the parties by law in such a way that their internal organisation is democratic enough to afford safeguards against autocratic control by a ruling group and oppression of minorities. This suggestion is not a revolutionary one in Germany, where political parties have already been accorded legal recognition for the purposes of electoral law and constitutional litigation. It would not at present be acceptable in Britain, but there is surely a strong case for doing away with make-believe and recognising the existence of political parties for certain legal purposes—for example, when reforming our antiquated law relating to election expenses, and by requiring party affiliations to be stated on ballot-papers.

Much of Dr. Leibholz's discussion revolves around the meanings of concepts. In the context of the British constitutional system, preoccupation with conceptual analysis is of doubtful utility. But in many continental systems concepts such as people, nation, state, liberty and equality are the currency of juridical debate. To the extent that they have been built into the framework of constitutions that demand legal interpretation they are more than mere political concepts. To the English lawyer, therefore, Dr. Leibholz's method of approach provides an instructive illustration of the basic differences between continental and British public law. And Dr. Leibholz holds his reader's interest by his frank recognition of the gulf between legal theory and political practice, and by his lucid exposition of the concepts that he examines.

Nevertheless, although this demonstration of the relativity of politico-legal concepts is the outstanding feature of the book, to Dr. Leibholz relativism is not enough. Not only are there ultimate values, but there are also ultimate concepts, pre-existing entities (*vorgegebene Wesenheiten*) which, in so far as they are given constitutional recognition, are the fundamental guiding principles of the social order. One of the tasks of jurisprudence is to apprehend the true essence of these ultimate concepts—a task that cannot be performed by means of the positivist, teleological or empirical approaches to legal philosophy. Dr. Leibholz is, in fact, a phenomenologist. This somewhat daunting revelation, which appears in the fourth part of the book, would seem to call for more sustained elucidation than the author provides. It is surprising to read, for example, that sovereignty and property are among these pre-existing entities. At least one reader was moved to feel that his difficulties at this point were not attributable solely to deficiencies in his linguistic equipment.

The two contributions in the third part of the book are addressed particularly to Dr. Leibholz's own countrymen. Neither his analysis of the totalitarian state nor his survey of the conflict between nationalism and political ideology in modern international relations embodies material that cannot be found elsewhere; but the intellectual content of these contributions is reinforced by an emotional strength that makes a powerful impression. There is more than a touch of nobility in his tribute to the martyrs of the German resistance movement, and it is fitting that such words should be permanently recorded among the author's scholarly works.

S. A. de Smith

The Professor and the Commissions. By Bernard Schwartz. [New York: Alfred A. Knopf. 1959. 275 pp. $4.00.]

Last year's public disclosures which led to the resignations of Sherman Adams and a commissioner of the Federal Communications Commission had

a significance for American administrative regulation deeper than the irresponsibility or venality in the celebrated cases. How public regulation has suffered at the hands of its directors is the major theme of *The Professor and the Commissions*, written by Dr. Bernard Schwartz, one of America's experts in administrative law. He charges the major regulatory commissions with failing to achieve the objectives for which they were created, especially of failing to act in the public interest and to adopt and apply comprehensive bodies of regulatory law in the areas of their competence. The book also recounts the author's dramatic career in Washington, which was headlined in American newspapers in the early months of 1958.

In 1957, at the instance of leaders in the House of Representatives, one of its committees, the Interstate and Foreign Commerce Committee, created a sub-committee, the Special Sub-committee on Legislative Oversight, to examine the execution of the laws by the regulatory commissions. Dr. Schwartz was chief counsel of the sub-committee from August 1, 1957, until his dismissal for insubordination on February 10, 1958. As a combatant in the struggles of the sub-committee, he of course has an interest in defending his controversial actions. His explanations will not please everyone, nor will his occasional speculations on the motives of his opponents and critics. However, the story of the difficulties faced in pursuing the investigation, stemming mainly from hostility to it by some members of the sub-committee, by other legislative leaders and by the commission members, is told convincingly. The post-dismissal period is also covered; it was at this time that Dr. Schwartz's charges and newspaper pressure forced the sub-committee hearings concerning Commissioner Mack and Sherman Adams.

Dr. Schwartz's main concern in the book is with the workings of the commissions. Regulating such areas as transportation, power, securities, radio and television, the commissions were designed to be expert bodies acting independently of all selfish pressures, whether by government, corporation or private citizen. One chapter in the book is devoted to whether commission action reflects the public interest. Another discusses whether the commissions embody expertise commensurate with their great powers, whether they are developing the bases for consistent economic regulation, and whether there is sufficient judicial control to correct abuses in their action. The answers given are dismaying. However, one may dispute some of the conclusions made from the evidence presented. When Congress delegated broad powers of economic legislation to a commission, and limited the grant only by an ambiguous standard of action such as the "public interest," it should have been realised that the price of intentional flexibility would be shifts of emphasis in the operation of the commission depending on the economic conceptions of succeeding commissioners as well as on changed economic conditions. What Dr. Schwartz regards as acting against the public interest in some of his examples may be explained as the result of honest differences of opinion as to what is in the public interest in a given area. Also, to show that the commissions are resorting to inconsistent criteria in their adjudications, the author cites only the practice of the Federal Communications Commission, merely adding that practitioners before the other commissions complain of the same inconsistency. This approach will not convince a legal analyst. Still, the evidence against commission practice is strong. The possibility of pressure or control arising under statutory powers of the President and the Bureau of the Budget; *ex parte* pressures to influence pending decisions exerted on commissioners by members of the legislature and the executive; instances of fraternisation between commissioners and representatives of regulated industries; the acceptance by commissioners of substantial favours from those regulated: all these impair confidence in the independent operation of the commissions. Likewise, open hostility by some commissioners to the regulation with which they are entrusted; the poor quality of some commissioners; the rapid turnover in personnel: these reflect on the reputation of the commissions as expert bodies.

The Professor and the Commissions is a strong argument for continued Congressional investigation and study of the role of commission regulation in the American economic scene. To restore independence and expertise to government regulation, Dr. Schwartz makes several sensible proposals, drawn partly from the Hoover and other public reports. Among these is the separation of the administrative and the adjudicatory functions of the commissions, the administrative functions to be performed within the executive branch of the government and the adjudicatory ones by an administrative court of the United States. Because of the learning displayed in the discussion of commission operation and the suggested reforms, this book, written more for the layman than the lawyer, should provide a starting point for professional debate on the remedies necessary to correct the abuses presently existing in the American commissions.

Donal Kinney.

Social Change in the Law of Trusts. By G. W. Keeton, M.A., LL.D. [London: Sir Isaac Pitman & Sons, Ltd. 1959. 124 and (index) 2 pp. 25s. net.]

The distinguished author has assembled a number of essays which have appeared in various legal journals. They were intended to explain "some of the problems created in the law of trusts by the social changes upon which the country has embarked . . . and the attempts which have been made to solve them either by judicial decision or statutory reform." The material is indicated by the chapter headings: The Selection of Trustees, Trustee Investments, *The Duke of Norfolk's Case* and The Perpetuity Rule, The Will of Peter Thellusson, Remoulding Beneficial Interests in Trusts, The Director as Trustee, The Charity Muddle, The Nathan Report and Charities, *The Diplock Case* and The Underpaid Beneficiary. It is obvious that many diverse pearls have been threaded on a single string. The last four chapters, concerned mainly with charitable trusts, make a sort of pendant linked with the first five by the isolated chapter on The Director as Trustee.

The book should be recommended not only to students of the law of trusts but also to economists, moral philosophers and any sociologists capable of understanding legal thought. Between the first five chapters there is a close connection. They treat of the decline of the virtues which make men willing and able trustees, the shrinkage of suitable trustee investments, the destruction of wealth, inflation; the "reach" of the settlor, having regard to the rule against perpetuities and the rule against inalienability, with the recommendations of the Law Reform Committee's Fourth Report; the provident and thrifty settlor, of whom the celebrated Thellusson is taken as the type or archetype; and the remoulding of beneficial interests, culminating in the Variation of Trusts Act, 1958. The theme which binds these five chapters is broadly the scope and value and the struggle for existence of the trust institution.

The reader with a kindness for equity will be made acutely uncomfortable, at any rate if he is of a reasonably gloomy turn of mind. For he is likely to visualise an institution which despite minor legislative reliefs may be in a state of decay from three independent causes, *viz.*, want of suitable men to be trustees; want of sufficient wealth to settle; want of that thrifty and far-sighted benevolence which makes men wish to settle their property. When the state becomes the All-Father, what need of private provision? The reviewer saw as in a fevered dream a diminished Chancery Division, a pallid and mournful procession of brain-starved equity lawyers, and other jural correlatives of the welfare state, namely, *no-Lewin*, *no-Keeton*, *no-Hanbury*, *etc.* Is the Trust about to follow its parent, the Use, into the nether world of Legal History? The reviewer has found a grain of comfort in the preface to the fifteenth edition of *Lewin* (1950), where the learned editor, Mr. R.

Cozens-Hardy Horne, wrote: "It must not be thought that, with the virtual extinction of the older forms of settlement, there has been a decline in the utility of trusts. Their popularity has never been greater." But that was nine years ago.

F. W. TAYLOR.

THE PRINCIPLES OF SCOTS AND ENGLISH LAND LAW—A HISTORICAL COMPARISON. By C. D'O. FARRAN, B.C.L., M.A., LL.B., PH.D. Edinburgh: W. Green & Son, Ltd. 1958. xiii and 254 and (appendix) 24 and (index) 4 pp. £3 net.]

COMPARATIVE studies within the United Kingdom are welcome, and particularly one such as this upon Land Law, which in both jurisdictions had been so important in the general development and shaping of the law. Dr. Farran's work is conceived according to a difficult plan. It is both general and detailed. On the one hand he is prepared, for example, to discuss the authorities on the question of whether or not an English leasehold can be described as a tenure, on the other he is prepared to draw general conclusions, in effect, over the whole field of law of the consequences of the Union.

The difficulties of such a plan are obvious. When one looks at the detailed or technical aspects, textbooks and authoritative writings are often cited as being of equal importance, which, particularly in a comparative book, is not always satisfactory, nor indeed is the admixture of authorities; to cite Dalrymple's *Essay on Entails* for a proposition on *De Donis* does not add greatly to the strength of the proposition in either jurisdiction. Moreover there are works which one would wish to see added or differently treated. While it is clear that much of the *Regiam Majestatem* is extracted from English writers it is not equally clear that it represents Scots contemporary law, and some parts of it should be treated with greater caution than is always the case here. Again, when it is said (p. 103), "It is therefore not surprising that all writers of Scots law without traceable exception describe the liferent as a usufruct," the proposition needs further argument. On the one hand, Sheriff Dobie, a modern writer of great learning, says in his *Liferent and Fee*, "The more modern view is to treat the rights of liferent and fee as forming two separate and co-existent estates," and for that view there is for example the authority of Erskine (ii.9.41). On the other hand the definitions of Skene in *De Verborum Significatione* of *Feodum* and of *Liberum Tenementum* might well have found place among the older authorities, and a warning that Craig also referred to the English life tenancy as a usufruct might have a bearing on the argument. (Humpty Dumpty's attitude to words is one of long standing.) It is true that the discussion would then involve uncertainties, and difficulties, but elsewhere like discussion has not (as has been indicated) been avoided, and by it the nature of a particular institution might have become clearer than it does merely by the process of posing many inconsistencies which relate to it.

Again, sometimes a reasonable desire to generalise mars the picture. "Barred from following English developments by new found national pride, and yet unable to revolutionise itself on civilian lines Scots land law had little choice but to remain in its pre-Edwardian state" (p. 75), may be a reasonable summary of the situation after the Wars of Independence. There are others: "The Scottish aim would rather be to use the smallest possible number of tools for the largest possible number of jobs, to abstract the general from the particular, and to avoid excessive technicality and needless elaboration"—Lord Cooper once wrote. National pride, or national (and commendable) habits of thought —perhaps the choice must be made, but again the possibility of that choice could be indicated if the book is to fulfil its purpose for those who only know one system or who know neither, who must after all be the primary persons interested in it. This difficulty over generalisation is accentuated when made

in respect of matters outside the strict confines of the title. The chapter, for example, on the effect of the Union glosses over too many problems without any real indication that they exist.

A few misprints (such as that on p. 82 where *a me* has become *de me*) are unhappy and, at times, the writing is irritating. The ironic question can come too close to facetiousness. There is little point, even in a footnote in asking (at p. 111) of the Law of Property Act, 1925, s. 1—"Surely it cannot be that the draftsman was a Scot?" when the lineage and training of Sir Benjamin Cherry are disclosed by a comprehensive reference book. The point to be made could be made with greater grace and clarity without resort to such devices. This sort of fault and those already referred to are regretted because in purpose the book was entirely admirable, in execution the contents disclose not merely much industry but also useful and valuable information. There must therefore be regret that the whole cannot be commended without reserve.

The main body of the text is completed with an Exordium on the Run-Rig and the English Open Field system and by fifteen appendices giving various illustrative conveyancing styles or forms both ancient and modern.

J. D. B. Mitchell.

Gibson's Conveyancing. Eighteenth edition. By R. H. Kersley, M.A., LL.M. [London: The Law Notes Lending Library, Ltd. 1959. cxxvii and 772 and (index) 73 pp. £4 net.]

Devotees of *Gibson* on glancing at this new edition will at once perceive that something has happened to the layout which makes the work physically easier to read. This is the effect of a larger type face, a welcome amenity in a volume of which every aspect pleases, type (including bold type for references to footnotes), paper, and black binding with three transverse spinal bands thereon coloured pink.

The learned editor points out that an apparent increase in length is illusory, for there are in fact fewer words than in the seventeenth edition. Some four hundred and fifty cases reported in the past seven years are named. Careful search by the reviewer has failed to detect the want of a single notable recent case capable of inclusion at publication date: indeed, the vigilant editor has seized the opportunity of noting in his preface *Regis Property Co. Ltd.* v. *Dudley* [1958] 3 W.L.R. 647; [1958] 3 All E.R. 491, reported too late to be included in the body of the book. *Warner* v. *Sampson* was still a decision of first instance when noted (p. 386). It has since been reversed by the Court of Appeal ([1959] 1 Q.B. 297; [1959] 1 All E.R. 120).

The seventeenth edition preceded the Landlord and Tenant Act, 1954. A clear and comprehensive treatment of this Act with references to an abundance of cases gives the student all he needs (pp. 458–465). Town and Country Planning is brought up to date with sufficient mention of the decisions which have clustered round the enforcement notice, to which the reader should now add *Guildford R.D.C.* v. *Penny* [1959] 2 All E.R. 111; [1959] 2 W.L.R. 643 and *Cater* v. *Essex C.C.* [1959] 2 All E.R. 213. The learned editor's aim is to "increase the usefulness of the book to practitioners as well as to students."

Book II is Conveyancing under the Land Registration Act. The student will find a well-arranged treatment in sixty-seven pages.

One or two small plaints may perhaps be uttered here. Part III of Book II is concerned with Transfers and Mortgages of Registered Land. Section 39 and rule 96 (restricting superfluous instruments where the transaction is by registered disposition) are not mentioned. Part IV is concerned with Unregistered Dealings with Registered Land. There is no mention of section 109 (restricting the exercise of powers of disposition off the register). It is submitted that these provisions should have been briefly explained. For

much that is tacitly understood by practitioners in registration areas of long standing needs to be made clear not only to students but also to solicitors in territories newly conquered by the Land Registration Act.

The new *Gibson* is a first-class piece of work and despite the growing complexity of law, whereby satisfactory statement has become more difficult, the eighteenth edition is probably a better exposition than any of its forerunners.

F. W. TAYLOR.

UNINCORPORATED NON-PROFIT ASSOCIATIONS: THEIR PROPERTY AND THEIR LIABILITY. By HAROLD A. J. FORD, S.J.D.(Harvard), LL.M.(Melb.), Reader in Law in the University of Melbourne. [Oxford: Clarendon Press; London: Oxford University Press. 1959. xxii and 151 pp. 25s. net.]

THIS is a very useful and timely work. Since Professor Dennis Lloyd's book on this subject went out of print the student and the practitioner have lacked guidance through one of the most confusing of legal labyrinths. To them this monograph, originally written as a thesis for the Harvard S.J.D., will be invaluable.

It is narrower in scope than Professor Lloyd's book, concentrating on two major problems—the vesting of property in unincorporated associations and their liability in contract and tort. These, however, are the two problems of the greatest practical importance in this field. Mr. Ford subjects them to scholarly and critical analysis and adds greatly to the value of his discussion by his use of comparative method; it is clear that a study of American and Commonwealth material might help us to extricate ourselves from the morass in which this branch of our law is wallowing.

It is to be hoped that the publication of this book may induce the Lord Chancellor's Department to consider whether the legal liability of unincorporated associations would not be a suitable topic to refer to the Law Reform Committee—which, it is rumoured, feels that it is beginning to run out of work. It is quite disgraceful that, in the middle of the twentieth century, someone who has been injured as a result of a tort or breach of contract committed on behalf of an unincorporated body should be left in the present uncertainty about whom, if anyone, he can sue and what fund, if any, will be liable to meet the judgment.

There are two aspects of this problem—one procedural and the other substantive. The purely procedural question could be answered quite easily—as it has in the case of partnerships—by allowing unincorporated associations to sue or be sued in the name of the association. The Rules Committee could have done this years ago—but, alas, when the history of law reform in England comes to be written one of the saddest features will be the failure of that Committee to perform its intended role of a law-reforming agency. Instead it merely undertakes the technical task of drafting rules to implement reforms suggested by other bodies. Hence, unless the Law Reform Committee, or an *ad-hoc* Committee, tackles this problem, we are not likely to see any improvement even in the purely procedural aspect. In any case, this is only half the problem. This substantive question of who or what is liable still has to be settled. It is here that Mr. Ford's analysis is so valuable. His thesis, in brief, is that a solution of the difficulties lies not in pursuing the wraith of legal "personality"—*Bonsor's* case has shown how elusive this may be—but rather in the recognition that there are "object-entities" other than corporations which may be involved in legal proceedings. In Anglo-American jurisprudence the adversary system tends to make every legal controversy appear to be one between persons rather than as one concerning what, as between various claimants, is to be done with certain

property. Yet tentative recognition of the alternative concept can be found in equitable proceedings relating to trust estates. Proceedings to recover from the common fund of an association are analogous. The problem is simply to find a means whereby the "object-entity"—the fund—may be represented in the proceedings by some "person" or "adversary-entity." When the "object-entity" itself is accorded corporate personality it can represent itself. When it is not a "person" then some human person must represent it. In claims to trust estates the trustees perform this role; in actions against associations the managing committee should be able to do so. It would then be possible to recover from the association's funds without getting involved with knotty problems of agency or metaphysical arguments about corporate personality.

This is a most stimulating little book—a work of "research" in the best sense of that abused word.

L. C. B. G.

Limitation of Actions. By Michael Franks. [London: Sweet & Maxwell, Ltd. 1959. ix and 323 pp. £3 3s. net.]

The most devoted admirer of the encyclopaedia would admit that it lacks something in continuity in the narrative and is, to that extent at least, unreadable as a continuous whole. Mr. Franks has deliberately inflicted this same defect on his book. Asserting (what few would deny) that the subject of limitation does not lend itself to easy treatment, he attempts a compromise between "gathering all the relevant material under each type of action" and "emphasising the factors common to all actions." In consequence, the Limitation Rules, contained in Part II and forming more than two-thirds of the text, are set out in an alphabetical arrangement and they are followed by a chapter on extensions and exceptions, another on limitation in equity and a few pages on practice. The emphasis is thus on "gathering all the relevant material under each type of action."

As a basis of classification, the alphabet should be the last resort; it is justified only if the subject contains no general principles or if (the subject-matter being, as here, a statute) the scheme of the statute is inherently absurd. Time alone will tell whether an alphabetical scheme (and, if so, the author's) will commend itself to the profession, but such a plan has its drawbacks. Thus, between Mortgages and Principal Sums secured on Property, we suddenly find a paragraph on Penalties and Forfeiture. Indeed, the alphabet sometimes betrays the author, as, for example, on page 102, where confusion appears to be due to the attempt to treat sales of land and of goods under the one heading.

It may well be claimed that this is a work of reference and that the alphabet is as handy an arrangement as any. Certainly, the book contains all the authorities. Moreover, where there are novel and difficult points on which there is as yet no judicial guidance, the author does not hesitate to express his views or to differ from his predecessors, *Preston and Newsom* (even as to the spelling of the latter's name, on p. 107). For example, in Settlements and Trusts for Sale, in the interpretation of section 7 of the Act of 1939, there are many loose ends in the law, but it is rarely that the author notes an apparent conflict (as, for instance, between section 7 (5) and section 10 (3)) without attempting to resolve it; more typical is his bold assertion of a rule with a footnote to the effect that "this only appears by inference from a dissenting judgment." On matters where authority is slight it is as well to have as many extrajudicial opinions as possible and it is hoped that in the next edition the author will allow himself more space in which to give reasons for his own views.

As a work of reference, the book suffers from some minor faults. The index is inadequate. There are many footnotes, but their wording and

punctuation need overhauling; they are not always accurate (for instance, note 45 on p. 129, arising out of spiritual corporations sole, directs us to see note 2, *supra*, which note refers to fattening oysters); they are often superfluous, being of the "*supra*," "*infra*," "see Index," "see other conveyancing works," type; nor, when the author writes "As mentioned above," is it necessary to append to the word "above" a footnote containing the one word "*supra*." This gratuitous instruction in the Latin tongue comes (on p. 201) too late for those who may need it. But these trifling defects, together with some unfortunate lapses from the rules of syntax, and some passages which are not as clear as the reader might wish, can no doubt be remedied in the second edition, thus affording the practitioner a useful addition to his library on a difficult topic.

J. A. COUTTS.

INTERNATIONAL ARBITRATION. By J. L. SIMPSON and HAZEL FOX. [London: Stevens & Sons, Ltd. 1959. Published under the auspices of the David Davies Memorial Institute of International Studies. xx and 330 pp. £2 2s. net.]

THE subject-matter of this book is described by the authors as being "the settlement by judicial process of disputes between States, or claims by the nationals of one State against another State." The settlement of disputes between nationals of different states is, however, excluded. Consequently no reference is made to the matters dealt with by the United Nations Conference on International Commercial Arbitration at New York in May-June 1958, which led to the adoption of a Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The authors were, no doubt, wise to concentrate their attention upon arrangements for settling interstate disputes, together with those cases where individuals have been permitted to bring actions against foreign governments under special arrangements made for this purpose by the governments concerned (*e.g.*, the Mixed Arbitral Tribunals established after the First World War). Even so, however, they were confronted with difficult problems of selection. To what extent, for instance, is it necessary in a book on international arbitration to explain the working of standing international courts, such as the International Court of Justice? Again, in explaining the procedure of international arbitral tribunals, to what extent is it necessary to expound the substantive rules of international law applied by these tribunals? On the whole the authors have solved the problem of selection commendably. They have taken the working of the International Court of Justice as a model suitable to be followed by arbitral tribunals in most cases, though capable of modification in special circumstances. They have thus carefully abstained from going over again the ground so carefully covered by Hudson and Rosenne in their authoritative works on the Court. As regards the substantive rules of international law, they have kept within reasonable bounds their treatment of such indispensable matters as the rule of the nationality of claims and the exhaustion of local remedies. The result is a work which achieves admirably its object of being "a book which, while serving as a guide to the conduct of international proceedings, may be of wider interest as an account of the ways in which international tribunals are established and discharge their functions."

As the authors acknowledge, the book is stronger on the practical side than on the theoretical. It begins with a brief history of international arbitration and goes on to deal admirably with the actual machinery of establishing tribunals and such matters as procedure, interlocutory proceedings, participation of additional parties and rules of evidence. In all these matters Mr. Simpson's experience as United Kingdom Agent in the *Disputed Cargoes* and *Buraimi* arbitrations must have been invaluable. On one or two

points it is possible to disagree with the authors. Their statement that there is a preference today for collegiate courts rather than individual arbitrators is probably correct, notwithstanding the fact that even in comparatively recent times important questions have been referred to sole arbitrators, *e.g.*, *Island of Palmas* (Judge Huber in 1925) and *Albanian Monetary Gold* (Professor Sauser-Hall in 1951). The authors also state that, in establishing collegiate tribunals, "a tendency is discernible to try to achieve a balance between 'the main forms of civilisation and the principal legal systems of the world'." Although the evidence is not very convincing, there may be signs of such a tendency (*e.g.*, the *Buraimi* arbitration, where, in addition to the national arbitrators of the United Kingdom and Saudi Arabia, the panel was composed of arbitrators drawn from Belgium, Cuba and Pakistan).

The phrase quoted above is taken from the Statute of the International Court of Justice. But it seems to the reviewer that, if a tribunal established on that basis is what the parties want, they would be well advised to go to the Court itself; but that, if they want a tribunal drawn from a more restricted area and composed of persons familiar with their own cultural traditions, they would be well advised to go to arbitration. It is one of the merits of arbitration, as opposed to the Court, that it is possible to set up a tribunal of a few selected legal experts and free of all political considerations. The *Ambatielos* case, cited by the authors to support their thesis, really proves the opposite. There, Greece and the United Kingdom, after two interlocutory hearings before the Court, decided to refer the merits of the case to a tribunal composed, in addition to the Greek and British members, of lawyers from Panama, Sweden and Belgium (not Switzerland, as stated in the book). Thus, the three "neutral" members were all drawn from the Western world, whereas if the phrase in the Court's Statute is interpreted literally—as it is by the United Nations electing organs concerned—it probably requires the seating of Communist and Afro-Asian arbitrators alongside those from the West.

It would be ungenerous to criticise a book, which is avowedly practical in purpose, for not grappling with some of the fundamental problems connected with the role of arbitration in international affairs. It is a pity, however, that the authors, having included as an appendix the Model Rules on Arbitral Procedure adopted by the International Law Commission at its tenth session, do not discuss at greater length either the rules themselves or the lucid report of the Commission explaining the circumstances of their adoption. Some explanation, for instance, would be useful of the reasons why these rules, designed to strengthen the procedures of international arbitration, were so coolly received by the General Assembly.

The authors themselves perhaps are not quite certain of the role of international arbitration. They take as their starting-point the International Law Commission's definition of arbitration "as the procedure for the settlement of disputes between States by a binding award on the basis of law and as the result of an undertaking voluntarily accepted." Rightly they distinguish between "arbitration" and "judicial settlement" (*i.e.*, settlement of a dispute on the basis of law by a permanently established court), and stress that arbitration is a more flexible process since the parties choose the arbitrators. But at times they come near to accepting a very different view of arbitration, such as that mentioned by the Permanent Court of International Justice in its famous Twelfth Advisory Opinion, where it said that arbitration, taken in its widest sense, is "characterised simply by the binding force of the pronouncement made by a third Party to whom the interested Parties have had recourse." The authors, for instance, say that arbitration is "flexible enough to be applied to a great variety of problems, some of them not of a juridical character at all, and often achieves its greatest success, when the solution found for the problem is designed to reconcile the interest of the parties by giving a measure of satisfaction to each."

The uncertainty of the position taken up by the authors shows itself again

in their treatment of the General Act for the Pacific Settlement of International Disputes of 1928. Chapter II of this Act was entitled "Judicial Settlement" and provided for the reference to the Permanent Court of International Justice of "disputes with regard to which the parties are in conflict as to their respective rights," although reference to an arbitral tribunal was to be an alternative method of settling such disputes. Chapter III of the Act, though entitled "Arbitration," provided for the settlement of disputes with regard to which the parties were not in conflict as to their respective rights. Curiously enough, these disputes were to be settled by the application of the rules of international law, although it was also stated that "in so far as there exists no rule applicable to the dispute, the tribunal shall decide *ex aequo et bono*." It is this provision which has attracted the criticism of many authors, including especially Brierly. The authors of the present work, however, seem to have no fundamental objection to the doctrinal basis of the General Act, although they rightly characterise some of its provisions as "obscure." It would not have been necessary to make this point but for the fact that, when arbitration breaks down, as it did in the *Buraimi* case, the fundamental cause is usually that the parties do not, and never did, mean the same thing by "arbitration," which, like "democracy," is a word that needs to be employed with extreme caution in the modern world.

D. H. N. JOHNSON.

EUROPEAN INSTITUTIONS. By A. H. ROBERTSON. [London: Stevens & Sons, Ltd. 1959. xix and 245 and (appendices) 122 pp. £2 2s. net.]

NATO AND THE EUROPEAN MOVEMENT. By M. MARGARET BALL. [London: Stevens & Sons, Ltd. 1959. xi and 427 and (bibliography) 30 and (index) 28 pp. £2 2s. net.]

READERS may be familiar with M. Luthy's remark that "the Foreign Ministers of Western Europe, like actors on a revolving stage that has got out of control, keep reappearing against a different backcloth, always playing a never-completed first act." We are in a position now where we can say without hesitation that the first act in the drama has been played out and the process of European integration is now moving into its second phase. The time is ripe for stocktaking and Dr. Robertson and Professor Ball are to be congratulated on their choice of moment to survey the scene. Particularly is there great scope since the stage is still out of control. The chorus characters might still find themselves as members of the Consultative Assembly of the Council of Europe, the Common Assembly of the European Coal and Steel Community and the Benelux Consultative Council or the Nordic Council. Between plenary sessions and committee work they have little time to adjust their make-up. The leading actors, members of the ministerial councils, are faced by equal physical impossibilities and may well be tempted to sacrifice their parts for the more spectacular role in the governments of their own countries.

Dr. Robertson is mainly concerned with the administrative and organisational problems of European integration. His work is a descriptive one. It is a fairly exhaustive study of the establishing and developing of the various organisations. He is open to criticism in that he does not mention a number of problems which would normally be expected to concern a lawyer. One might suggest that there is scope for some discussion of the European Convention on Human Rights, considered by many to be the most important achievement of the Council of Europe, and more especially of the Commission established to consider claims under this convention and the court which is

to give judicial consideration to certain claims. More especially one would like to see an effort made to tackle the fundamental constitutional problems which have arisen. The relationship between the theory and practice of municipal and regional constitutional law presents a fascinating problem and one which should provide a most illuminating study.

This apart, his work is an excellent study of the subject from an organisational standpoint. His suggestions for a simplification of the European stage (p. 232 *et seq.*) are too detailed to be considered in a review, but they constitute a bold effort which demands sympathetic consideration. The work contains a large and useful appendix setting out the numerous conventions establishing the European organisations.

Professor Ball is an American, an academic and a political scientist. This may explain why her study, far from duplicating Dr. Robertson's work, is complementary to it. She is concerned not so much with the legal and organisational problems which have arisen but rather with the political significance of the new movement. Her survey of the economic, social, military and cultural successes and failures of the new institutions is accurate, exhaustive and thoroughly worth while. Like Dr. Robertson's, her study returns to the central problem. Now that we have all these institutions, what can we do to ensure their working harmoniously together? Can we avoid over-burdening individuals? Can the proliferation of administrative staff be reduced? Can actual or potential duplication of activity be prevented? What is to be done to overcome the sheer weight of documentation?

The problem presents itself in two aspects. First there is a conflict between the desires of the states concerned. These states can be grouped very roughly in three categories. There are those states who desire a fairly advanced degree of federation in certain governmental functions. These are the countries commonly termed the Six or Little Europe, namely France, Germany, Italy and the Benelux countries (Belgium, Netherlands and Luxembourg). In the second category are those states whose concern is primarily with Europe and who desire a harmonising of interests, to which end they have joined the Council of Europe, OEEC and other larger European organisations. Among these states may be noticed Austria and Sweden and to a lesser extent the other Scandinavian countries and Switzerland. Finally there are those states whose interests are not primarily European and who are more broadly interested in the Atlantic Community. These include the United Kingdom, United States, Canada, Portugal and, despite the geographical freakishness of the situation, Greece and Turkey. While the other states are sympathetic to the Six they have evidenced no intention of joining them in their ventures.

The second aspect of the problem is that those organisations which exist to harmonise state interests themselves need harmonising. There is a tremendous amount of duplication of activity between OEEC and the economic activities of the Council of Europe, between Western European Union and NATO and to a lesser extent between the European Coal and Steel Community and OEEC.

Anyone who doubts the existence of conflict need only read the still recent history of the conflict of interests arising out of the establishing of a European Economic Community (France, Italy, Germany and Benelux) and the establishment of the free trade area at present being worked out within the framework of OEEC.

It is easy to suggest methods of avoiding or arresting political conflict. It is difficult to persuade others to agree to one's suggestions and even more difficult to put them into practice. But suggestions can and have been made. For example, would it not be more convenient if Western European Union were incorporated into the framework of NATO? Would it not be possible to incorporate OEEC into the framework of the Council of Europe? Agreed Switzerland and Portugal are members of OEEC and are not members of the Council but is that an insuperable difficulty?

To understand the present structure and to appreciate the difficulties inherent in it the reader will do well to refer to these books. Anyone unfamiliar with the subject will do better to start with Dr. Robertson's book, since that gives a clearer explanation of the various organisations, their structure and functions. Anyone possessed of such a knowledge will do well to refer to Professor Ball's book. In this latter work he will find a survey of the post-war period up to 1958. After this reading he will be reasonably competent to judge the situation for himself.

If the reviewer is permitted a private grumble one further point might be made. We are all familiar with the terms UN, NATO, Benelux, OEEC. This pastime of coining words from the initial letters of organisations is threatening to run riot. The reader of Professor Ball's book will be able to add to his stock: FINNEBEL and FRITALUX (both expressions referring to the proposed customs union of the Benelux countries, France and Italy), COMECON (Council for Mutual Economic Assistance), UNIFORCE (Unified defence force established by the Brussels Treaty Powers), UNISCAN (Consultative economic association of the United Kingdom, Sweden, Norway and Denmark), GEORG (*Gemeinschaftsorganisation Ruhrkohle* or Ruhr coal monopoly) and ATIC (*Association Technique de l'Importation Charbonnière*). This list is by no means complete. The expressions are a short and convenient means of reference for those who are closely associated with these organisations. For students they sometimes provide amusement. For the reader they are neither convenient nor amusing when he has to refer to the footnotes or abbreviations list to find out to what the expression refers. If these expressions have to be foisted on us, then in the case of these rarities would it not be better to give the full title of the organisation in the text and its dubbing in a footnote?

J. A. ANDREWS.

THE HIGH COURT OF CHIVALRY. By G. D. SQUIBB. [Oxford: Clarendon Press; London: Oxford University Press. 1959. 288 pp. £2 2s. net.]

MR. SQUIBB'S book is a monument of patient erudition and must needs be the definitive work on this ancient jurisdiction, which was so picturesquely revived in 1954. Of great interest is his account of the procedure of the court, resembling that of the Admiralty and the ecclesiastical courts, and the Appendices of typical forms used in proceedings. Also of general interest is the account of the substantive law, English (not Roman, as suggested by the book's sub-title) in its origins, governing the title to gentility and the use of armorial bearings. Gentility was based on mere repute, but arms required some form of grant or prescription, in this case from 1066 not 1189 (p. 180). How far the court was concerned with peerage claims is much less clear, but in the strict sense it appears that the Earl Marshal's advice was not given in a completely judicial capacity (p. 153 *et seq.*).

The present social atmosphere is not conducive to detailed study of many of the claims referred to in this book and it seems a healthy symptom of English life that the Court of Chivalry was in suspense for such long periods and that so many of the proceedings which were started in it led to no useful conclusion. By 1348, when the court emerges into the light, knighthood is no longer in its pristine flower, the feudal levy is a thing of the past, and disputes over honours and escutcheons have become matters of vain pride rather than military identity and dignity. An interesting slander jurisdiction in the seventeenth century was suppressed at its close. Trial of grave crimes committed by Englishmen abroad went on for a much longer period and was only abolished in 1819. The precise competence of the court and the vexed question of the validity of trials by the Earl Marshal without the High

Constable troubled contemporaries as much as they do the legal historian of today.

A. K. R. Kiralfy.

Criminal Case and Comment 1958. Editor: J. C. Smith, M.A., LL.B. [London: Sweet & Maxwell, Ltd. 1959. xx and 163 pp. 17s. 6d. net.]

This volume contains summaries of and comments on over 100 cases decided in 1958 arranged under about 50 headings in alphabetical order. A comparison with the *Current Law Year Book* for 1958, which contains 179 entries under the rubric of Criminal Law, shows that most of the cases decided in 1958 have been included; on the other hand there are some surprising omissions, such as *Nieser* (on receiving) or *Cunningham* (on provocation). As the decision of the Court of Appeal in *Re Hastings* is reported, there should be at least a reference to *Re Hastings* (*No. 2*) which was decided later on in the Divisional Court.

In view of the possibly misleading direction on page vii it should be emphasised that this volume provides only brief summaries of the decisions. The principal contribution made by it must therefore be sought in the commentaries which draw attention to the important and controversial aspects of the decisions and which also give some useful directions to other literature. Payee of a cheque should be substituted for drawee on page 42 in the comments on *Potter*.

J. U.

Books and Publications Received

Legal Penalties. A Report by Justice. Chairman: Sir David Cairns, Q.C. [London: Stevens & Sons, Ltd. 1959. 18 pp. 3s. 6d.]

From Precedent to Precedent. The Romanes Lecture delivered in the Sheldonian Theatre May 21, 1959, by The Right Hon. Lord Denning of Whitchurch. [Clarendon Press: Oxford University Press, Oxford. 34 pp. 2s. 6d.]

Fees and Faculties. Report of a Commission of the Church Assembly. [The Church Information Office, Church House, Westminster, S.W.1. 1959. 82 pp. 5s.]

What is Unlawful? Does Innocence Begin where Crime Ends? Afterthoughts on the Wolfenden Report. By Quentin Edwards. [Published for the Church of England Moral Welfare Council by the Church Information Office, Church House, Westminster, S.W.1. 1959. 14 pp. 1s. 6d.]

A Guide to Legal Research. By Erwin C. Surrency, and Benjamin Feld, and Joseph Crea. [New York: Oceana Publications, Inc. 1959. 124 pp. $4.50.]

The 1959 Income Tax Legislation in the Federation of Rhodesia and Nyasaland. By A. S. Silke. [Juta & Co., Ltd. Distributed by Sweet & Maxwell, Ltd. 1959. 51 pp. 21s.]

Laws of the State of Israel. Vol. II, 5717—1956/57. Authorised Translation from the Hebrew, prepared at the Ministry of Justice. [Published by the Government Printer. 240 pp. IL.4.]